The Replacement of Lawful Economic Strikers in the Public Sector in Ohio

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I. INTRODUCTION

The National Labor Relations Act (NLRA)[1] provides that it shall not be construed "to interfere with or impede or diminish in any way the right to strike," except as expressly stated therein.[2] The NLRA is silent on the right of private employers[3] to replace striking workers. Since *NLRB v. Mackay Radio & Telegraph Co.*,[4] however, the settled rule in private sector labor law has been that an employer may hire permanent replacements for economic strikers—that is, workers who are striking to force compliance with the union's collective bargaining demands.[5] In contrast, the National Labor Relations Board (NLRB)[6] has held consistently that during unfair labor practice strikes[7] only temporary replacements may be used[8] and that all unfair labor practice strikers are, therefore, entitled to reinstatement.[9]

The recently enacted Ohio Public Employee Collective Bargaining Law (PECBL)[10] authorizes certain nonsafety public employees to engage in an economic strike after appropriate notices have been given and all impasse procedures have been

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1. 29 U.S.C. §§ 151–69 (1982).

2. *Id.* § 163.

3. Public employers are excluded from the NLRA. *See id.* § 152(2) (term "employer" does not include a state or political subdivision thereof).

4. 304 U.S. 333 (1938).

5. *See, e.g.*, Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 725 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964). The employer is limited only by its duty not to discriminate against certain strikers because of their union activities. *See, e.g.*, NLRB v. Wiltse, 188 F.2d 917, 924–25 (6th Cir.), *cert. denied*, 342 U.S. 859 (1951). *See also infra* note 41.

6. The NLRB is the agency created by Congress to administer the NLRA. The NLRB's powers are set forth in 29 U.S.C. § 153 (1982).

7. An unfair labor practice strike is a work stoppage protesting an employer's unfair labor practice. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 339 (1976). Some strikes involve a mixture of unfair labor practices and economic factors. *See infra* note 70.

8. Scobell Chem. Co., 121 N.L.R.B. 1130, 1132 (1958), *enforced*, 267 F.2d 922 (2d Cir. 1959).

9. Kitty Clover, Inc., 103 N.L.R.B. 1665, *enforced*, 208 F.2d 212 (8th Cir. 1953).

10. OHIO REV. CODE ANN. §§ 4117.01–.23 (Page Supp. 1984) (effective Apr. 1, 1984). *See generally* R. LARSON, T. BUMPASS, K. ASHMUS & D. WARD, PUBLIC SECTOR COLLECTIVE BARGAINING: THE OHIO SYSTEM (1984); J. LEWIS & S. SPIRN, OHIO COLLECTIVE BARGAINING LAW: THE REGULATION OF PUBLIC EMPLOYER-EMPLOYEE LABOR RELATIONS (1983); J. O'REILLY, OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING (1984); BRICKER & ECKLER, A SUMMARY OF THE OHIO PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT (1983); Bumpass & Ashmus, *Public Sector Bargaining in a Democracy: An Assessment of the Ohio Public Employee Collective Bargaining Law*, 33 CLEV. ST. L. REV. 593 (1985); O'Reilly, *Ohio Begins Public Sector Bargaining: "The Best of Times" Lies Ahead*, 35 CASE W. RES. L. REV. 426 (1985); O'Reilly & Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891 (1983); White, Kaplan & Hawkins, *Ohio's Public Employee Bargaining Law: Can It Withstand Constitutional Challenge?*, 53 U. CIN. L. REV. 1 (1984); Note, *Student Project: Public Sector Collective Bargaining in Ohio: Before and After Senate Bill No. 133*, 17 AKRON L. REV. 229 (1983); Legislation Note, *S. 133: Ohio's Public-Sector Collective-Bargaining Framework*, 9 U. DAYTON L. REV. 583 (1984); Comment, *Public Employee Collective Bargaining Becomes a Matter of Right in Ohio*, 13 CAP. U.L. REV. 219 (1983).

exhausted.[11] Like the NLRA, the PECBL is silent on whether public employers in Ohio may replace lawfully striking workers. Neither the Ohio State Employment Relations Board (SERB)[12] nor the courts have had occasion yet to rule on the right of public employers in Ohio to replace economic strikers.

This Article addresses a single question: May public employers in Ohio replace lawful economic strikers? In seeking an answer this Article examines the right to strike under the PECBL, the employer's right to replace strikers under private sector labor law, the distinctions between private and public sector strikes, the pertinent language and legislative history of the PECBL, the Ohio civil service law, the due process clauses of the Ohio and the United States Constitutions, and the relevant precedents in other jurisdictions. None of these provide a conclusive answer. Consequently, in the absence of a clear directive from the legislature, the answer requires a policy choice by the SERB and, eventually, the courts. This Article surveys the range of choices and, after considering the competing considerations, concludes that permitting temporary replacements but prohibiting permanent replacements best accommodates the interests involved.

II. THE RIGHT TO STRIKE UNDER THE PECBL

Ohio is one of twelve states that does not prohibit all public employees from striking.[13] The PECBL grants an affirmative right to strike to some public employees;[14] however, this grant contains substantial limitations.[15] Only state and local employees who meet the PECBL's definition of "public employees"[16] and who are

11. OHIO REV. CODE ANN. § 4117.14(D)(2) (Page Supp. 1984). *See infra* Part II.

12. The SERB is the agency created by the Ohio General Assembly to administer the PECBL. The SERB's powers are set forth in OHIO REV. CODE ANN. § 4117.02 (Page Supp. 1984).

13. Besides Ohio, limited statutory strike rights exist in Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin. *See* ALASKA STAT. § 23.40.200 (1984); HAWAII REV. STAT. § 89–12 (1976 & Supp. 1984); IDAHO CODE § 44–1811 (1977), *as construed in* Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 642, 586 P.2d 1346, 1357 (1978); ILL. ANN. STAT. ch. 48 § 1617 (Smith-Hurd Supp. 1985); MINN. STAT. § 179 A.18 (1984); MONT. CODE ANN. § 39–31–201 (1983), *as construed in* State *ex rel.* Dep't of Highways v. Pub. Employees Craft Council, 165 Mont. 349, 351–54, 529 P.2d 785, 786–88 (1974); OR. REV. STAT. § 243.726 (1983); 43 PA. CONS. STAT. ANN. §§ 1101.1001–.1003 (Purdon Supp. 1985); VT. STAT. ANN. tit. 21, § 1730 (1978); WIS. STAT. ANN. § 111.70(4)(cm)(6)(c) (West Supp. 1985). In addition, the California Supreme Court, after noting the legislative silence on the issue, has held that it will not recognize the common law prohibition against public sector strikes, unless the strike poses an imminent threat to public health or safety. County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 38 Cal. 3d 564, 585–86, 699 P.2d 835, 849–50, 214 Cal. Rptr. 424, 438–39 (1985).

14. OHIO REV. CODE ANN. § 4117.14(D)(2) (Page Supp. 1984). For other discussions of the right to strike under the PECBL see BRICKER & ECKLER, *supra* note 10, 36–44; R. LARSON, T. BUMPASS, K. ASHMUS & D. WARD, *supra* note 10, 91–99; J. O'REILLY, *supra* note 10, 81–84; Bumpass & Ashmus, *supra* note 10; O'Reilly & Gath, *supra* note 10, 919–27; Legislation Note, *supra* note 10, 595–601; Note, *supra* note 10, 243–44.

15. One type of work stoppage, however, is not subject to any statutory limitation. The PECBL provides that "[s]toppage of work by employees in good faith because of dangerous or unhealthful working conditions at the place of employment which are abnormal to the place of employment shall not be deemed a strike." OHIO REV. CODE ANN. § 4117.01(H) (Page Supp. 1984). Consequently, no state or local employee is subject to the PECBL's restrictions on the right to strike if she in good faith ceases working because of abnormally dangerous or unhealthful working conditions.

16. *Id.* § 4117.01(C) defines "public employee." This definition excludes, among others, supervisors, managerial employees, confidential employees, court employees, SERB employees, and legislative employees. In addition, employees of municipal corporations and townships with populations of less than 5,000 are not "public employees" because their employers do not satisfy the definition of a "public employer." *Id.* § 4117.01(B). Thus, many persons who are employed by state or local government entities are not permitted to strike because they are not "public employees" as defined by the PECBL.

not precluded from striking by the PECBL are authorized to strike. PECBL prohibits, among others, safety personnel, guards, and certain medical workers from striking.[17]

Furthermore, even those public employees permitted to strike do not have an unlimited right to do so. To constitute a legal strike, a series of notice requirements and impasse procedures must be followed by the union. First, no lawful strike may occur upon the expiration of a collective bargaining agreement unless the union triggers a negotiation period by sending a written notice to the employer requesting negotiations at least sixty days earlier.[18] When there is no pre-existing collective bargaining agreement, the union must serve a written notice initiating the negotiation period at least ninety days before a strike.[19] Second, forty-five days before the end of the negotiation period, the union and the employer must permit a mediator to assist them in the negotiations.[20] Third, thirty days before the end of the negotiation period, both parties must submit their positions on each issue to a fact-finding panel which will make a recommendation on each unresolved issue.[21] Fourth, even though all impasse procedures have been followed, the union, prior to striking, must give the employer written notice of its intention to strike ten days in advance.[22] Finally,

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17. *Id.* § 4117.15(A). The following public employees are prohibited from striking:

> members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, correction officers, guards at penal or mental institutions, or special policemen or policewomen appointed in accordance with sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities [and] youth leaders employed at juvenile correctional facilities . . . .

Id. These employees, if their union and employer have been unable to negotiate a collective bargaining agreement after using mediation and fact-finding, must use binding final-offer arbitration, referred to in the PECBL as "conciliation." *See id.* § 4117.14(D)(1), (G).

18. *Id.* § 4117.14(B)(3). For each day closer than sixty days before the contract's expiration date that notice is given, the strike must be delayed one day. *Id.* For example, a notice of desire to bargain served 45 days before expiration of the collective bargaining agreement triggers a 60-day pre-strike waiting period; therefore, the union must wait 15 days after expiration of the contract to strike. In addition to serving written notice of a desire to negotiate upon the employer, a copy of the written notice and a copy of the existing collective bargaining agreement must be served upon the SERB. *Id.* § 4117.14(B)(1)(c).

19. *Id.* § 4117.14(B)(2).

20. *Id.* § 4117.14(C)(2). The SERB will select the mediator. *Id.* The mediator has fourteen days to assist the union and the employer to reach an agreement before the SERB will appoint a fact-finding panel. *Id.* § 4117.14(C)(3). The SERB may continue mediation while fact-finding is occurring. *Id.* § 4117.14(C)(3)(b).

21. *Id.* § 4117.14(C)(3). Fact-finding as conducted under the PECBL is really advisory arbitration, although the fact-finding panel may attempt mediation. *Id.* § 4117.14(C)(4)(f). The panel investigates all unresolved issues, receives each party's written statement on each issue, and holds hearings. *Id.* § 4117.14(C)(3)(a), (4)(a). The panel must issue written findings of facts and recommendations on unresolved issues within 14 days after appointment unless the parties mutually agree to an extension. *Id.* § 4117.14(C)(5). Unless the union or the employer's governing legislative body rejects the panel's recommendations by a three-fifths vote of its respective membership within seven days after the recommendations are issued, the fact-finding panel's recommendations are deemed agreed upon. *Id.* § 4117.14(C)(6). Although the PECBL does not expressly require the union to take a vote before striking, this procedure, in practical effect, amounts to a requirement that at least sixty percent of the membership prefer a strike to accepting the fact finder's recommendations whenever the employer's governing legislative body has not rejected the recommendations. If either party rejects the recommendations, they are published, *id.*, for such influence on public opinion as they may have while the parties resume bargaining, probably with the renewed assistance of a mediator. *Id.* § 4117.14(D)(2).

22. *Id.* §§ 4117.11(B)(8), .14(D)(2). A written notice stating the date and the time the strike will begin must be served on both the employer and the SERB. *Id.* § 4117.11(B)(8). The parties may extend the effectiveness of the notice by written mutual agreement. *Id.*

although the union has complied with the sixty-day[23] and the ten-day[24] notice requirements and exhausted the mediation and fact-finding impasse procedures, and although the strike is lawful, the employer may obtain an injunction for a maximum of sixty-three days if the "strike creates a clear and present danger to the health or safety of the public."[25]

Thus, the PECBL authorizes only economic strikes after the exhaustion of all impasse procedures and after the appropriate notices have been given. Conversely, strikes are not authorized during the term of a collective bargaining agreement,[26] during the pendency of impasse procedures,[27] for recognitional purposes,[28] on account of a jurisdictional work dispute,[29] to protest an employer unfair labor practice,[30] or by unrepresented public employees.[31] In addition to narrowly circumscribing the right to strike, the PECBL prohibits an employer from locking out its employees to bring pressure on the union during collective bargaining.[32] Although the PECBL expressly permits employers to discharge employees engaged in an unlawful strike after a one-day notice to return to work with subsequent review by the SERB and the courts,[33] it does not address the right of an employer to replace its lawfully striking workers. Consequently, one must search elsewhere to determine whether public employers in Ohio may replace lawful economic strikers.

III. The Employer's Right to Replace Strikers Under the NLRA

In the private sector, a striking employee's right to reinstatement or, conversely, an employer's right to replace the striker is governed by whether the work stoppage is an economic strike or an unfair labor practice strike.[34] An economic strike is a work stoppage by employees to demonstrate their support for either their bargaining demands relating to wages and working conditions, or their union's request for recognition by the employer.[35] On the other hand, an unfair labor practice strike is an

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23. *Id.* § 4117.14(B)(1)(a). In the case of initial negotiations between the employer and the union, a 90-day negotiation notice is required. *Id.* § 4117.14(B)(2).

24. *Id.* §§ 4117.11(B)(8), .14(D)(2).

25. *Id.* § 4117.16(A). Under this provision, the employer must first obtain a limited three-day temporary restraining order from a court of common pleas. The employer must then request authorization from the SERB to enjoin the strike beyond expiration of the three-day temporary restraining order. If the SERB finds that a clear and present danger exists, the court that issued the restraining order may enjoin the strike for up to 60 additional days or until an agreement is reached, whichever occurs first. *Id.* Once the 60-day injunction is issued, both parties must negotiate with the assistance of a mediator. *Id.* § 4117.16(B). After 45 days of bargaining, if no agreement has been reached, the mediator may publish a report on each party's position and final offer of settlement. *Id.* If no agreement has been reached by the end of the 60-day injunction, the employees may resume their strike and no court may issue a further injunction. *Id.* § 4117.16(A).

26. *Id.* § 4117.18(C); *see also id.* § 4117.15(A).

27. *Id.* § 4117.18(C); *see also id.* § 4117.15(A).

28. *See id.* § 4117.11(B)(5).

29. *See id.* § 4117.11(B)(4).

30. *See id.* § 4117.15(B).

31. Because bargaining must occur before a strike is authorized, *see id.* § 4117.14(D)(2), and because bargaining must take place between an employer and the labor organization certified as the exclusive representative of employees in an appropriate unit, *see id.* §§ 4117.04, .05, .14, unrepresented public employees appear to have no right to strike.

32. *Id.* § 4117.11(A)(7).

33. *Id.* § 4117.23.

34. NLRB v. Thayer Co., 213 F.2d 748, 752–53 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).

35. *See* NLRB v. Herman Wilson Lumber Co., 355 F.2d 426, 430 (8th Cir. 1966); *see infra* note 41.

employee work stoppage provoked not by economic concerns, but by the employer's unfair labor practices.[36] As will be discussed below, in the private sector a striking employee has an absolute right to reinstatement when an unfair labor practice strike is terminated, but only a qualified right to reinstatement at the end of an economic strike.[37]

A. *Economic Strikers*

The exertion of economic pressure by employers and unions against each other to achieve bargaining objectives is an integral part of the collective bargaining process in the private sector. As the Supreme Court noted twenty-five years ago: "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[38]

Private employers may lawfully take the initiative in this economic struggle by implementing a lockout[39] of the workers, as long as the purpose is to exert bargaining pressure and not to discriminate against union employees.[40] More frequently, however, the union takes the first step in the form of an economic strike[41] against its members' employer, which is a protected concerted activity expressly guaranteed under the NLRA.[42] An employer may respond by filling the jobs vacated by economic strikers with replacement workers. The conflict between the workers' strike and the private employer's replacement of strikers represents the pressure and counter-pressure left almost exclusively to the control of the free play of economic forces.[43]

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36. R. GORMAN, *supra* note 7, at 339. Some strikes involve a mixture of unfair labor practices and economic factors. *See infra* note 70.

37. The employee may lose these rights, however, if she engages in strike violence and misconduct. The level of misconduct is necessarily more than "minimal," but how much more has caused courts and the NLRB much confusion. *See, e.g.*, Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046–47 (1984) (striker's verbal threats, unaccompanied by physical acts or menacing gestures, not per se protected against discharge; whether there is protection against discharge depends on whether striker's misconduct, under all the circumstances, "may reasonably tend to coerce or intimidate" other employees; in determining reinstatement rights of unfair labor practice strikers engaging in misconduct, the NLRB will not balance severity of employer's unfair labor practice against gravity of striker's misconduct); W.C. McQuaide, Inc., 220 N.L.R.B. 593, 594 (1975) (verbal threats by strikers, "not accompanied by any physical acts or gestures," do not warrant an employer's refusal to reinstate strikers), *enforcement denied in pertinent part*, 552 F.2d 519 (3d Cir. 1977); Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (balancing severity of employer's unfair labor practices that provoked strike against gravity of striker's misconduct); NLRB v. Thayer Co., 213 F.2d 748, 753 (1st Cir. 1954) (holding that employees' misconduct does not, ipso facto, preclude NLRB from ordering reinstatement if such an order, using a balancing test, would effectuate purposes of NLRA), *cert. denied*, 348 U.S. 883 (1955). *See also infra* notes 53 & 69.

38. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960).

39. A lockout is "the withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining a concession from them." 2 C. MORRIS, THE DEVELOPING LABOR LAW 1034 (2d ed. 1983).

40. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308–09 (1965).

41. An economic strike is one that is neither caused nor prolonged by an employer's unfair labor practice. *See* R. GORMAN, *supra* note 7, at 339–41; Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 725–29 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964). Although economic strikes are generally used in attempting to enforce economic demands upon the employer, this object is not an absolute requirement. *See, e.g.*, Philanz Oldsmobile, Inc., 137 N.L.R.B. 867 (1962) (strike designed to persuade employer to agree to consent election deemed an economic strike).

42. Section 7 of the NLRA provides, in part: "Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1982). Section 13 of the NLRA is even more explicit: "Nothing in [the NLRA], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.* at § 163.

43. *See, e.g.*, Belknap, Inc. v. Hale, 463 U.S. 491, 535–36 (1983) (Brennan, J., dissenting); Lodge 76, Int'l Ass'n

The law of replacements in the private sector had its genesis in the famous dictum of *NLRB v. Mackay Radio & Telegraph Co.*[44] in which the Court said that replacing striking employees with others in an effort to continue business was legal.[45] After employing substitute workers, the employer in *Mackay* reinstated some but not all the strikers. The Court declared that although the right to strike was statutory, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers."[46] The Court added that no employer is "bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them,"[47] and that Mackay had not violated the law by offering replacements permanent employment.

Since the *Mackay* decision, it has been considered as settled that where the private employer is "guilty of no act denounced by the statute," it has a right, in order to keep its plant in operation, to hire permanent replacements for economic strikers, and thus to deprive such replaced strikers of an immediate right of reinstatement.[48] If strike replacements are hired for only a temporary period, however, the economic striker is entitled to reinstatement upon making an unconditional request for re-employment.[49] The burden is on the employer to show that the replacements were

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of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140–41 & n.4, 147 (1976). The employment of strike replacements is not a recent development in management strategy in the private sector. *See* Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).

44. 304 U.S. 333 (1938).

45. *Id.* at 345. The Court's statement concerning the legality of permanently replacing economic strikers was unnecessary for the resolution of the issue before the Court. In *Mackay*, the employer had offered permanent employment to those who had replaced its economic strikers. Five replacements decided to stay permanently after the conclusion of the strike. Consequently, there was no work for five strikers when all the strikers returned to work. In deciding which five strikers not to reinstate, the employer selected those most active in union affairs. Because the NLRB had challenged only the employer's discriminatory reinstatement policy, the right to replace economic strikers was not an issue before the Court. On the question presented, the Court agreed with the NLRB that refusing to reinstate those who had been most active in union affairs violated the NLRA. *Id.* at 347. The NLRB had reserved the question of the legality of permanently replacing economic strikers because disposition of that question had not been necessary to the Board's decision condemning the denial of reinstatement to five strikers because of their union activities. *See* Mackay Radio & Tel. Co., 1 N.L.R.B. 201, 216 (1936), *enforcement denied*, 92 F.2d 761 (9th Cir. 1937), *rev'd*, 304 U.S. 333 (1938). For a vigorous criticism of the Court's dictum, see J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 21–24 (1983) (noting that the brief of the NLRB's General Counsel, apparently relying on a position taken by the NLRB's predecessor, the National Labor Board, had conceded an employer's right to hire permanent replacements, even though the NLRB had not decided the issue).

46. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

47. *Id.* at 345–46.

48. *See, e.g.*, 8 NLRB ANN. REP. 32 (1943):

> If employees go out on strike for economic reasons and not because of any unfair labor practices on the part of their employer, the latter may replace them in order to keep his business running, and the strikers thereafter have no absolute right of reinstatement to their old jobs. After the termination of a strike, however, an employer may not discriminatorily refuse to reinstate or reemploy the strikers merely because of their union membership or concerted activity.

Id. (footnotes omitted).

See also, e.g., Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 274 (8th Cir. 1983) ("The legal parameters of an employer's replacement rights are well defined.").

49. C.H. Guenther & Son v. NLRB, 427 F.2d 983 (5th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970). One commentator has argued for the abolition of the permanent replacement requirement and urged that economic strikers should have no right to return to their struck jobs once their places have been filled by "regular and substantially equivalent job holders." Anderson, *"Permanent" Replacements of Strikers after* Belknap: *The Employer's Quandary*, 18 J. MAR. L. REV. 321, 339 (1985).

permanent.[50]

Although a private employer may lawfully refuse an economic striker's request for reinstatement if she has been permanently replaced prior to termination of the strike, an economic strike is deemed to be protected activity under section 7 of the NLRA.[51] Consequently, it is an unfair labor practice for a private employer to discharge an employee for engaging in an economic strike.[52]

The right not to be discharged—even though she is subject to permanent replacement—is significant to the economic striker for two reasons. First, if an economic striker's job has not been filled by a permanent replacement, she may apply for reemployment when the strike ends. Upon receipt of an unconditional request for reemployment, the employer is required to reinstate the striker if a vacancy exists.[53]

Second, even if the economic striker's job has been filled by a permanent replacement, she is entitled to be placed on a preferential hiring list and given the first

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50. NLRB v. Murray Products, Inc., 584 F.2d 934, 939 (9th Cir. 1978) (The employer failed to prove the replacements were permanent when they were originally told they were temporary, and the employer's alleged decision to make them permanent was not communicated to the replacements, to the union, or to the strikers.); Covington Furniture Mfg. Corp., 212 N.L.R.B. 214, 220 (1974) ("[T]he employer's hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses."), *enforced*, 514 F.2d 995 (6th Cir. 1975).

51. *See, e.g.*, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). In *Great Dane*, the Supreme Court held that an employer could not lawfully refuse to pay economic strikers vacation benefits which had accrued under a terminated collective bargaining agreement, while announcing an intent to pay such benefits to those individuals who had worked on a certain day during the strike. In *Erie Resistor*, the Court ruled that an employer could not grant superseniority to permanent replacements in order to assure their continued employment after the end of the economic strike, even if superseniority had been necessary to induce the replacements to accept employment.

As Professor Schatzki has noted, these two cases and *Mackay* create a highly anomalous situation in the private sector. "Economic strikers are free from the 'terrible' threats of superseniority and better vacation benefits for strikebreakers, but not from the relatively 'innocuous' threat of losing their jobs entirely for engaging in the strike." Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 386 (1969).

52. *E.g.*, NLRB v. United States Cold Storage Corp., 203 F.2d 924 (5th Cir.) (employer committed unfair labor practice by discharging economic strikers prior to filling their jobs), *cert. denied*, 346 U.S. 818 (1953); *see also*, NLRB v. International Van Lines, 409 U.S. 48 (1972) (The employer had to offer unconditional reinstatement to striking employees whom it had fired before hiring permanent replacements, regardless of whether or not the discharges converted the strike from an economic to an unfair labor practice strike. The discharges themselves were unfair labor practices sufficient to justify the NLRB's reinstatement order.).

53. In order to take advantage of their reinstatement rights, unreplaced economic strikers must make an unconditional application for reinstatement, either personally or through their union. Michael Muldoon Elder, 227 N.L.R.B. 446 (1976); Swearingen Aviation Corp. v. NLRB, 568 F.2d 458 (5th Cir. 1978). *See* Moore Business Forms, Inc., 224 N.L.R.B. 393, 408–10 (1976), *enforced in relevant part*, 574 F.2d 835 (5th Cir. 1978). A union's offer to return to work was held to be "unconditional" despite the fact that its members continued to picket the employer's main entrance. NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 529 (3d Cir. 1977). The offer must be specific. A union's request for reinstatement of strikers to "their old jobs or the maximum employment opportunity which the law allows" has been held not to be sufficiently specific to include job vacancies at a new plant opened by the employer just prior to the strike. Bryan Infants Wear Co., 235 N.L.R.B. 1305, 1306 (1978).

In Abilities & Goodwill, Inc., 241 N.L.R.B. 27 (1979), the NLRB reversed 30 years of precedent by declaring that discriminatorily discharged strikers are not required to request reinstatement to trigger the employer's back-pay obligation. Instead, the back-pay obligation is triggered by the discharge, as in the case of a nonstriking dischargee. The First Circuit denied enforcement of the NLRB's order on other grounds, 612 F.2d 6 (1st Cir. 1980), but the doctrine was later accepted in NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 755–57 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

Regardless of whether replacements have been hired, an employer is not required to offer reinstatement to economic strikers who have been guilty of serious misconduct during a strike. Overhead Door Corp. v. NLRB, 540 F.2d 878 (7th Cir. 1976); Jerr-Dan Corp., 237 N.L.R.B. 302, 311 (1978). *See also* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Local 833, UAW v. NLRB (Kohler Co.), 300 F.2d 699 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1962); NLRB v. Ohio Calcium Co., 133 F.2d 721 (6th Cir. 1943); Republic Steel Corp. v. NLRB, 107 F.2d 472 (3d Cir. 1939).

opportunity to fill an opening occurring in the future. The right of permanently replaced economic strikers to preferential status in hiring was first recognized by the Supreme Court in *NLRB v. Fleetwood Trailer Co.*[54] In *Fleetwood*, an economic strike caused a reduction in production such that when the strike ended and the strikers applied for reinstatement, their jobs no longer existed because of the temporary cutback. When full production resumed two months later, the employer hired new applicants instead of reinstating the former strikers. The NLRB held that this violated sections 8(a)(1) and (3) of the NLRA.[55] In affirming the decision, the Supreme Court explained that refusing to reinstate economic strikers, if not immediately upon their application for reinstatement, then at least at some later point when vacancies occur, has an adverse impact on employee rights.[56] The Court concluded that "[i]f and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show 'legitimate and substantial business justifications.'"[57]

In *Laidlaw Corporation*,[58] the NLRB expanded the reinstatement rights of permanently replaced economic strikers. The NLRB held that, even if on the date of application for reinstatement a permanent replacement holds the striker's job, the employer must later seek out the former striker and give her priority over new applicants for any comparable job that opens by virtue of the replacement's departure.[59]

The *Laidlaw* rule remains the law,[60] although its application has been refined and elaborated upon in several cases.[61] Reinstatement must be with fully vested employment benefits, including seniority.[62] It is unlawful to reinstate an economic striker to

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54. 389 U.S. 375 (1967).

55. Fleetwood Trailer Co., 153 N.L.R.B. 425, 429 (1965), *enforcement denied*, 126 F.2d 126 (9th Cir. 1966), *vacated*, 389 U.S. 375 (1967).

56. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967).

57. *Id.* at 381 (*quoting* NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967)).

58. 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

59. *Id.* at 1369. The NLRB defined the status of replaced economic strikers as follows:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Id. at 1369–70.

60. *E.g.*, Zapex Corp., 235 N.L.R.B. 1237, 1248 (1978); Bralco Metals, Inc., 227 N.L.R.B. 973, 983 (1977). But striking employees who engage in unprotected activity by picketing in violation of §§ 8(b)(7)(B) or (C) of the NLRA are not entitled to reinstatement upon their unconditional application for reinstatement. Claremont Polychemical Corp., 196 N.L.R.B. 613, 615 (1972); Castle-Pierce Printing Co., Inc., 251 N.L.R.B. 1293 (1980); NLRB v. Colonial Haven Nursing Home, 542 F.2d 691 (7th Cir. 1976).

61. For cases dealing with the issue of who is a permanent replacement, see Cyr Bottle Gas Co., 204 N.L.R.B. 527 (1973), *enforced*, 497 F.2d 900 (6th Cir. 1974); Covington Furniture Mfg. Corp., 212 N.L.R.B. 214 (1974), *enforced*, 514 F.2d 995 (6th Cir. 1975); H & F Binch Co., 188 N.L.R.B. 720 (1971), *enforcement denied in relevant part*, 456 F.2d 357 (2d Cir. 1972). Cases dealing with the issue of which striker has been replaced include Pillows of California, 207 N.L.R.B. 369 (1973), and Laura E. Weber, 194 N.L.R.B. 426 (1971). Reinstatement to a job for which the striker is not qualified and for which the striker receives no training, followed by the striker's discharge for not meeting production quotas on the job, violates § 8(a)(3). Elsing Mfg. Co., 209 N.L.R.B. 1089 (1974).

62. Globe Molded Plastics Co., 204 N.L.R.B. 1041 (1973) (reinstatement without former seniority lacks any business justification and is illegal even without proof of union animus).

the same position at a reduced rate of pay.[63] Furthermore, the right of reinstatement is activated not only by the departure of the precise individual who replaced the economic striker but also by any job opening for which the former striker is qualified.[64]

The NLRB also has refused to place a time limit on the duration of the reinstatement rights of economic strikers who have made an unconditional application for reinstatement.[65] In *Brooks Research & Manufacturing, Inc.*,[66] the NLRB rejected the employer's complaints of the burdens that would be imposed if the obligation to seek out former strikers for job openings continued indefinitely. The NLRB noted that there were various procedures by which the employer could cope with the burden of maintaining indefinitely a preferential recall list.[67] In addition, the NLRB has recognized that the duration of reinstatement rights can be limited by a strike settlement agreement negotiated between the employer and the union.[68]

In summary, under the NLRA as it has been construed by the NLRB and the courts, the economic striker is guaranteed her employee status, although not necessarily her job. The employer is not entitled to treat the exercise of the right to engage in an economic strike as a form of misconduct and thus as cause for discharge. If and when the employees decide to end their strike, they are entitled to exercise their right to return as employees without any discrimination by reason of their strike.

The economic strikers are not guaranteed, however, the right to return to their jobs since the employer has remained free to operate during the strike. The employer may hire replacements to fill the jobs of the strikers, and retain these replacements in the limited number of jobs even when the strikers want to return to work. Although economic strikers have the right to be kept on a recall list, that may be cold comfort if the entire unit has been permanently replaced by the employer during the strike.

B. *Unfair Labor Practice Strikers*

In stark contrast to the reinstatement right of an economic striker, an unfair labor practice striker's right to reinstatement is absolute in the private sector.[69] If a strike

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63. Northwest Oyster Farms, Inc., 173 N.L.R.B. 872, 876 (1968) (to reinstate to the same position at a reduced rate of pay is inherently destructive of protected employee rights and is unlawful).

64. Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163 (8th Cir. 1972).

65. Brooks Research & Mfg., Inc., 202 N.L.R.B. 634 (1973).

66. *Id.*

67. *Id.* at 636. *Cf.* Penn Corp., 239 N.L.R.B. 45 (1978), *enforced*, 630 F.2d 561 (8th Cir. 1979) (employer may not require permanently replaced economic strikers to affirmatively renew their applications for reinstatement within six months or be removed automatically from the recall list).

68. In United Aircraft Corp., 192 N.L.R.B. 382 (1971), *enforced in part sub nom.*, Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976), the NLRB indicated that it would accept a strike settlement agreement as determining the reinstatement rights of economic strikers if the period fixed by the agreement for reinstatement of the strikers (1) is not unreasonably short, (2) is not intended to be discriminatory or misused by either party with the intent of accomplishing a discriminatory objective, (3) was not insisted upon by the employer to undermine the status of the union, and (4) was the result of good faith bargaining. *Id.* at 388. On remand, the Board concluded that any breach by the employer of a strike settlement agreement governing the rehiring of strikers is ipso facto a violation of § 8(a)(3). United Aircraft Corp., 247 N.L.R.B. 1042 (1980).

69. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956). Of course, strikers who have been guilty of strike misconduct or who have been discharged "for cause" under § 10(c) of the NLRA need not be reinstated, notwithstanding the fact that the work stoppage was an unfair labor practice strike. *See, e.g.*, Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984) (the reinstatement right of an unfair labor practice striker depends on whether the striker's misconduct, under

is characterized as an unfair labor practice strike, the employees have an unconditional right to be reinstated. A strike will be characterized as an unfair labor practice strike if an unfair labor practice precipitated the strike to any degree, even if it was only one of multiple causes of the strike.[70] Furthermore, unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional demand for reinstatment, even if this requires dismissal of replacements who have been hired to fill their jobs during the strike.[71] Even if the unfair labor practice striker's job is no longer in existence, she is entitled to immediate reinstatement in a substantially equivalent position.[72]

The special status of unfair labor practice strikers is underscored by the fact that even a general no-strike clause in a collective bargaining agreement does not waive the employees' right to strike in response to serious unfair labor practices by the employer. In *Mastro Plastics Corp. v. NLRB*,[73] the employees struck even though their contract contained a no-strike clause. The strike was clearly precipitated by the employer's unfair labor practice. Rejecting the employer's argument that the words "any strike" necessarily include all strikes, the Supreme Court held that a general no-strike clause does not waive the employees' right to strike in response to unfair labor practices committed by the employer. In *Arlan's Department Store*,[74] the NLRB construed *Mastro Plastics* to mean that only strikes protesting *serious* unfair labor practices should be held immune from general no-strike clauses.[75]

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all the circumstances, may reasonably tend to coerce or intimidate other employees). The reinstatement right of strikers who have engaged in strike misconduct is beyond the scope of this Article. For discussions of this topic, see 2 C. MORRIS, *supra* note 39, at 1008–09; R. GORMAN, *supra* note 7, at 349–53.

70. NLRB v. Crystal Springs Shirt Corp., 637 F.2d 399, 404 (5th Cir. 1981).

A strike may be caused both by a bargaining impasse and by an unfair labor practice. Such a strike is deemed an unfair labor practice strike unless the employer shows that the strike would have occurred even in the absence of its unfair labor practice. *See* NLRB v. Borg-Warner Corp., 236 F.2d 898 (6th Cir. 1956), *rev'd in part on other grounds*, 356 U.S. 342 (1958). Similarly, if an employer commits unfair labor practices during an economic strike, a finding of a causal connection between the employer's conduct and a continuation of the strike will convert the stoppage into an unfair labor practice strike and strikers who are replaced thereafter will be treated as unfair labor practice strikers. *See* American Cyanamid Co. v. NLRB, 592 F.2d 356 (7th Cir. 1979) (employer's contracting out of work without bargaining with union converted economic strike to unfair labor practice strike); NLRB v. Moore Business Forms, Inc., 574 F.2d 835 (5th Cir. 1978) (discharge of strikers converted economic strike into unfair labor practice strike); Carpenters Dist. Council, 221 N.L.R.B. 876 (1975) (economic strike converted into unfair labor practice strike by employer's bad faith bargaining). *See generally*, Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice: I & II*, 45 VA. L. REV. 1322, 1327–36 (1959), 49 VA. L. REV. 1297, 1297–1301 (1963) (initial article on strike conversion with update in light of important subsequent decisions); Comment, *Reconversion of Unfair Labor Practice Strikes to Economic Strikes*, 64 GEO. L.J. 1143 (1976).

71. *E.g.*, George Banta Co. v. NLRB, 604 F.2d 830, 832 n.1 (4th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); NLRB v. Efco Mfg. Co., 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956); NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942). Displaced striker replacements may have civil causes of action for breach of contract and misrepresentation against an employer who has promised them permanent employment. *See* Belknap, Inc. v. Hale, 463 U.S. 491 (1983), discussed *infra* note 88.

72. *See, e.g.*, Airport Parking Management, 264 N.L.R.B. 5, 14 (1982); Inta-Roto, Inc., 252 N.L.R.B. 764, 773 (1980); Rogers Mfg. Co., 197 N.L.R.B. 1264, 1269 (1972).

73. 350 U.S. 270 (1956).

74. 133 N.L.R.B. 802 (1961).

75. *Id.* at 807. Member Fanning dissented, taking the position that all unfair labor practices are serious. *Id.* at 814 (Fanning, M., dissenting). Although the distinction between "serious" and "non-serious" unfair labor practices is generally followed, the courts have not always agreed on what constitutes a "serious" unfair labor practice. *See* Caterpillar Tractor Co. v. NLRB, 658 F.2d 1242, 1245–48 (7th Cir. 1981); Dow Chemical Co., 244 N.L.R.B. 1060 (1979), *enforcement denied*, 636 F.2d 1352 (3d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

In summary, unfair labor practice strikers possess more expansive reinstatement rights than economic strikers in the private sector.[76] Neither the economic striker nor the unfair labor practice striker may be discharged.[77] The employer, however, may seek to continue operating during the strike by hiring permanent replacements or temporary replacements—such as supervisors, relatives, or company employees outside the bargaining unit—who only serve pending the termination of the strike. In the case of the unfair labor practice striker who makes an unconditional request for reinstatement, the employer must reinstate the striker to her original position and oust the replacement.[78] In contrast, the employer may permanently replace the economic striker and is under no obligation to reinstate her immediately or to oust the permanent replacement.[79] The NLRB and the courts have narrowed the distinction between economic strikers and unfair labor practice strikers, however, by deciding that the economic striker is entitled, upon unconditional application, to preferential reinstatement status even though her position is not available on the date of her application for reinstatement due to temporary economic retrenchment or to the presence of a permanent replacement.

C. *A Critique of Replacement Rights in the Private Sector*

Private sector labor rulings concerning the rights of strikers have been subjected to vigorous scholarly criticism.[80] Some commentators have questioned the distinction between unfair labor practice strikes and economic strikes and the resulting grant of greater reinstatement rights to unfair labor practice strikers.[81] In addition, the wisdom of the *Mackay* decision permitting employers to permanently replace economic strikers has been attacked because of its chilling effect upon workers' right to strike and its capricious effects in practice.[82]

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76. *See generally* Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 639–41 (1966).

77. NLRB v. International Van Lines, 409 U.S. 48 (1972).

78. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).

79. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

80. *See, e.g.*, J. ATLESON, *supra* note 45, at 19–34; Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 387–94 (1984); Janes, *The Illusion of Permanency for* Mackay *Doctrine Replacement Workers*, 54 TEX. L. REV. 126 (1975); Gillespie, *The* Mackay *Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782 (1972); Schatzki, *supra* note 51, at 382–92; Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817, 830–32 (1941); Note, *supra* note 76.

81. *See, e.g.*, Gillespie, *supra* note 80, at 785; Note, *supra* note 76, at 639–41; *see generally* Stewart, *supra* note 70. *See infra* text accompanying notes 83–93.

82. *See* authorities cited in note 80 *supra; see infra* text accompanying notes 94–103. The *Mackay* doctrine, however, has been explained on two grounds. First, the doctrine may be explained as a balancing of economic power:

> The only rational explanation for the *Mackay* doctrine is based on the concept of balancing economic weapons of the parties engaged in the collective-bargaining battle. To allow the union to strike to accomplish its economic ends and then to prevent the employer from carrying on his business in any meaningful fashion by outlawing all permanent replacements would place the balance of power too heavily in the hands of the union.

Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470, 487–88 (1966).

Second, the doctrine may be explained as a protection of property rights: "Management has the right to attempt to continue the operation of its business when subjected to an economic strike. While the *Mackay* Court did not develop the origin of this right, it clearly flows from the 'right of property' guaranteed under both federal and state constitutions." Unkovic & Harty, *Management's Legal Problems in Continuing Plant Operations During an Economic Strike Under Federal and Pennsylvania Law*, 67 DICK. L. REV. 63, 63 (1962) (footnotes omitted).

The difference in the right to reinstatement between economic strikers and unfair labor practice strikers creates painful problems in practice, particularly for an employer who has been successful in defeating a strike by hiring permanent replacements. When the union decides to end the strike and the strikers make an unconditional offer to return to work, the employer may be faced with a dilemma.[83] If the strike was purely economic, the employer can refuse to reinstate those who have been permanently replaced.[84] If the employer committed any unfair labor practices which contributed to causing the strike, then it must reinstate the strikers even though this means dismissing replacements;[85] refusal to reinstate renders the employer liable for full back pay.[86] Even though the strike was economic in its inception, it may be converted by any unfair labor practice which prolongs the strike.[87] Again, the employer will be liable for back pay if it refuses to reinstate a striker who was replaced after the unfair labor practice.[88]

The difficulty is that at the time the strikers offer to return to work, the employer may not know whether they are economic strikers or unfair labor practice strikers. Determination of whether the employer has committed an unfair labor practice and whether that practice has contributed to causing or prolonging a strike may not be made until months later. The employer denies reinstatement at the peril of costly back pay awards.[89] The union may file unfair labor practice charges, including claims of refusal to bargain in good faith, in order to protect any potential rights of the strikers to reinstatement and to remind the employer of its peril.[90] Consequently, a reinstate-

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83. One commentator has labeled the employer's dilemma a "Catch-22." Anderson, *supra* note 49, at 321. The distinction between the rights of economic and unfair labor practice strikers also poses a very serious dilemma for employees who face a potentially permanent job loss should they erroneously predict that the Board will find that their employer has committed an unfair labor practice.

84. *See supra* text accompanying note 48.

85. *See supra* text accompanying notes 69–72.

86. *See* Maurice Embroidery Works, Inc., 111 N.L.R.B. 1143, 1160 (1955).

87. *See supra* note 70.

88. *See* American Cyanamid Co., 235 N.L.R.B. 1316, 1325 (1978), *enforced*, 592 F.2d 356 (7th Cir. 1979).

The Supreme Court's recent decision in Belknap, Inc. v. Hale, 463 U.S. 491 (1983), further complicates the employer's position. In *Belknap*, the employer presented each strike replacement with a statement that he or she had been employed as a "regular full-time permanent replacement." *Id.* at 494–95. The employer settled an unfair labor practice complaint based upon the union's charge against it by allowing the strikers to return to work, which resulted in the dismissal of the replacements. *Id.* at 496. The Court held that the dismissed replacements were free to pursue state law contract and tort claims against the employer for breach of its guarantee of permanent replacement. *Id.* at 512.

If unfair labor practice strikers and economic strikers were treated similarly, however, the employer could avoid this dilemma because it would know at the time of replacement the kind of representations it could make without guessing whether the strikers are engaging in an economic or unfair labor practice strike. The Court in *Belknap* suggested that an employer could avoid liability to strike replacements under current law by promising the replacements "permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers . . . ." *Id.* at 503.

89. *See, e.g.*, Gillespie, *supra* note 80, at 785:

> The line between the two types of disputes may be unclear, or an economic strike may be converted in midstream into an unfair labor practice strike. Working under these inconsistent standards, both management and union may have difficulties determining their respective rights. If management mistakenly assumes it faces an economic strike and hires permanent replacements, or if an economic strike turns into an unfair labor practice strike, management may incur heavy back pay costs. If employees strike against unfair labor practices but the NLRB disagrees and classifies them as economic strikers, they may find themselves permanently displaced.

Id. (footnotes omitted).

90. *See* J. ATLESON, *supra* note 45, at 187–88 n.29 ("Many 8(a)(5) refusal-to-bargain cases, for instance, are fought to protect the status of replaced strikers rather than for the often minimal vindicatory value of a cease-and-desist order.").

ment rule which would apply equally to unfair labor practice and economic strikers would be desirable.[91]

Furthermore, neither the NLRB nor the courts have explained why the unfair labor practice striker should be entitled to greater protection than the economic striker. An unfair labor practice strike is an attempt by the employees to resolve their dispute with their employer by resorting to self-help. A legal procedure exists, however, for resolving such disputes.[92] In contrast, economic strikers must resort to self-help because they have no legal procedure for forcing their employer to acquiesce in their bargaining demands. Therefore, it seems anomalous to provide greater protection for unfair labor practice strikers.[93]

The *Mackay* doctrine has been directly criticized on several other fronts. Some commentators criticize the doctrine for curtailing a right that the NLRA explicitly grants to employees—the right to strike.[94] The *Mackay* rule may render the right to strike illusory because workers may not be willing to risk permanent loss of employment in order to exercise this statutorily protected right. Thus, it has been suggested that the balance reached in *Mackay* between employees' section 7 rights and the employer's interest in continuing operations improperly provides management with a weapon sufficient to eliminate union supporters from the workplace.[95] Furthermore, replacement workers undermine the union's status as the workers' bargaining representative because permanent replacements are likely to be anti-union and may vote in decertification elections during a strike.[96]

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91. At least one commentator has argued that abolishing the *Mackay* doctrine in favor of a rule that allows the employer to hire only temporary replacements is the only way to ensure uniform treatment of strikers. Note, *supra* note 76, at 639–41.

92. Section 10 of the NLRA, 29 U.S.C. § 160 (1982), empowers the NLRB to determine whether an alleged unfair labor practice has occurred and "to take such affirmative action . . . as will effectuate the policies of [the NLRA] . . . ." *Id.* § 160(c).

93. On the other hand, it could be argued that because the employer's violation of the statute caused or prolonged the strike, the employer should not be permitted any countermeasures at all to defeat the strike, including the hiring of temporary replacements to continue operations.

94. *See supra* note 42 and accompanying text. *See, e.g.*, J. ATLESON, *supra* note 45, at 179 ("The [*Mackay*] doctrine obviously mocks the protection of the right to strike . . . ."); Note, *supra* note 76, at 634:

> Section 13 of the [NLRA] expressly refers to labor's "right to strike." Other sections of the [NLRA] reinforce this fundamental guarantee. But its full exercise is restrained by permanent replacement. At times, even the threat of such replacement may prevent the calling of a work stoppage or cause a striking union to surrender to management's demands. For the strike may result in the permanent loss of members' jobs and the elimination of pension, seniority or other rights acquired through previous service.

Id. (footnote omitted).

95. Gillespie, *supra* note 80, at 783–87. *See also* J. ATLESON, *supra* note 45, at 24–28; Schatzki, *supra* note 51, at 385; Note, *supra* note 76, at 634, 639.

96. Employees who desire to oust an incumbent union are permitted to seek an election to decertify the union. 29 U.S.C. § 159(c)(1)(A)(ii) (1982). An economic striker who has been permanently replaced is generally entitled to vote in a decertification election conducted within 12 months of the start of the strike. *Id.* § 159(c)(3). A permanent replacement may vote during a decertification election if she satisfies the usual eligibility requirements—*i.e.*, she is employed on the date of the election and, if the strike predates the election order, also on the customary payroll date. A permanent replacement may vote even though the strike began after the election was ordered. Macy's Missouri-Kansas Div., 173 N.L.R.B. 1500 (1969). In contrast, unfair labor practice strikers are entitled to vote regardless of the duration of the strike, and their replacements are never permitted to vote. Rivoli Mills, Inc., 104 N.L.R.B. 169, 182–83 (1953), *enforced per curiam*, 212 F.2d 792 (6th Cir. 1954). *See generally* Note, *Right of Economic Strikers to Vote in NLRB Elections*, 12 SYRACUSE L. REV. 218, 218–20 (1960); 1 C. MORRIS, *supra* note 39, at 388–89.

Several commentators have noted the opportunity this gives the employer to oust the union. *See e.g.*, Note, *supra* note 76, at 634 ("An employer can hire, and characterize as 'permanent,' a sufficient number of strikebreakers to force the union's decertification. This weapon gives him control over the decision whether or not his plant will be unionized

As an alternative to abolishing the *Mackay* rule, some commentators propose requiring the employer to prove that it had no choice but to hire permanent replacements.[97] The basic principle of *Mackay*, that an employer can do business only by offering permanent employment to replacement workers, is open to serious question.[98] The employer has several alternatives to combat the strike without hiring permanent replacements. These include hiring temporary replacement workers,[99] shutting down, reducing the labor force, locking out, purchasing strike insurance, and submitting to binding arbitration.[100]

Some authors argue that the *Mackay* rule is arbitrary and capricious in practice.[101] When unemployment is low, replacements may not be available, but when community unemployment is high, the employer can more easily replace strikers. The right to replace may be no right at all in a union-oriented community with little unemployment, but may break a strike in a city where the labor movement is weak and unemployment is high.[102] As a practical matter, the weakest unions and the least skilled workers suffer most from the permanent replacement weapon.[103]

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by allowing him to nullify the strikers' choice of a bargaining representative."); Gillespie, *supra* note 80, at 786 ("[T]he permanent replacement doctrine . . . facilitates manipulation of the election process to remove the union."); J. ATLESON, *supra* note 45, at 27 ("[T]he replacement of a substantial number of strikers can predictably result in the destruction of the union's representational status.").

97. *See* Gillespie, *supra* note 80, at 791–95 (listing factors a court should consider in determining whether the employer acted soundly); *see also* Janes, *supra* note 80, at 150.

98. *See* Schatzki, *supra* note 51, at 385. *But see* Unkovic & Harty, *supra* note 82, at 70 & n.39 (arguing that using temporary replacement workers is economically inefficient).

99. *See* Schatzki, *supra* note 51, at 392. In some pro-union communities, however, where little unemployment exists and the citizenry is hostile to strikebreakers, the employer may not be able to hire temporary replacements. Gillespie, *supra* note 80, at 789. In that situation, the employer should have to demonstrate a legitimate and substantial business justification for hiring permanent replacements. *Id.* at 796–97. Certain seasonal occupations, for example, may justify the need to hire permanent workers. *Id.* at 795.

100. *See* Gillespie, *supra* note 80, at 790–91.

101. *See id.* at 788–89:

> Practical considerations, however, may in many instances prevent the employer from using [permanent replacements]. Permanent replacements may not be available in a given locality if employment is full, if the work is skilled, or if the community is union-oriented and hostile to strikebreakers. The employer may not be able to have deliveries or pickups made because of picketing on his premises, or he may be dissuaded from using the device for fear of the bitterness or violence that could result. Because replacements are least available in large, skilled industry, the *Mackay* doctrine functions, in a sense, as a subsidy to small business.

Id. (footnote omitted). *See also* Schatzki, *supra* note 82, at 488; Schatzki, *supra* note 51, at 384; Weiler, *supra* note 80, at 394; Note, *supra* note 76, at 630. *See also* Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 79 (1956) ("The right to replace is more often than not a purely paper right either because of lack of qualified replacements or because its exercise would produce bitterness, if not bloodshed.").

102. *See* authorities cited in note 101 *supra*.

On the other hand, in establishing a market-based system of collective bargaining in which the government is to play no role in dictating terms and conditions of employment, Congress apparently intended for these kinds of local economic factors to play a greater role in determining the efficacy of a strike than matters arguably more relevant to the labor dispute.

103. *See, e.g.*, Gillespie, *supra* note 80, at 784 ("Permanent replacement takes its heaviest toll from weak unions, while against strong unions it has proved of little utility."); Schatzki, *supra* note 51, at 384. ("The real effect of the doctrine is to give greater strength to those employers who least need it, and to permit those employers to rid themselves of union employees and the union."); J. ATLESON, *supra* note 45, at 28 ("[T]he *Mackay* doctrine may well harm those employees in the weakest bargaining position.") (footnote omitted).

The discharge-replacement distinction of the *Mackay* rule is also subject to criticism. In the context of an employee's refusal to cross a picket line at another's place of business, the Supreme Court has condemned the discharge-replacement distinction:

> The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by [*Mackay*]. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by

Although the *Mackay* rule is firmly rooted in private sector labor law,[104] in view of the substantial scholarly criticism directed at permitting permanent strike replacements,[105] the SERB and the courts should hesitate before superimposing the *Mackay* doctrine on the Ohio public sector.

D. *The Impact of Private Sector Labor Rulings on Public Sector Labor Law*

In deciding whether the precedents under the NLRA concerning the replacement of strikers should be superimposed upon the legislative scheme devised by the Ohio General Assembly, reflection on the role private sector case law should play in the development of public sector labor law is instructive.[106] Collective bargaining is a relatively new concept in the public sector[107] with a paucity of decisions governing key issues.[108] Because public sector labor relations are regulated by individual state or local statutes, executive orders, and attorney general opinions, the case law in any jurisdiction may be limited or nonexistent. Furthermore, applicability of case law among different jurisdictions may be restricted because state collective bargaining laws vary widely.

Precedent in the private sector is extensive, however, since the NLRA has been interpreted through a centralized agency, the NLRB, for more than fifty years. Consequently, several public sector tribunals have relied on private sector precedents because the statutory language in both sectors often coincides.[109] When parallel

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> a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.

NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75 (1953). The Court, however, has not questioned the discharge-replacement distinction in the economic strike context. The terminology of the employment severance (discharge or replacement) and the chronological order of the severance and the replacement still control in the economic strike context. Professor Weiler has noted, however, that "the employee may be excused for not perceiving a practical difference [between permanent replacement and discharge] as far as his rights under section 7 are concerned." Weiler, *supra* note 80, at 390 (footnote omitted).

104. There is no reason to believe that the permanent replacement rule of *Mackay* will be abandoned in the private sector. In NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967), the Court, in dictum, expressly endorsed *Mackay*.

105. "[F]ew rules of American labor law have been as heavily criticized as the legality of hiring permanent strike replacements." Weiler, *supra* note 80, at 393.

106. *See generally* Edwards, *The Impact of Private Sector Principles in the Public Sector: Bargaining Rights for Supervisors and the Duty to Bargain*, in UNION POWER AND PUBLIC POLICY 51 (D. Lipskey, ed. 1975).

107. The first statute extending some bargaining rights to public employees was not enacted until 1957. *See* Act of Apr. 27, 1957, ch. 789, § 1, 1957 Minn. Laws 1073 (codified as amended at MINN. STAT. ANN. §§ 179A.01–.25 (West Supp. 1985)). In 1962, President Kennedy's Executive Order 10988 recognized that federal employees have the right to join or not to join unions without fear of reprisal, that agreements providing for grievance procedures may be negotiated, and that a code of fair labor practices and standards of conduct for the unions could be prepared. *See* Exec. Order No. 10988, 3 C.F.R. 521 (1962), *reprinted in* 5 U.S.C. § 631 (1964). It was not until the 1960s that public sector collective bargaining of the sort characteristic of the private sector existed except in a few isolated situations. *See* Note, *Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887, 896–98 (1972). Of course, the roots of public sector unionism run deep, and there were notorious earlier union activities, such as the Boston police strike in 1919. *See generally id.*; S. SPERO, GOVERNMENT AS EMPLOYER (1948); D. ZISKIND, 1000 STRIKES OF GOVERNMENT EMPLOYEES (1940); W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICES (1961).

108. For example, two prominent publishers of public sector cases have published fewer than ten bound volumes each. The National Public Employee Reporter series consists of six bound volumes and the CCH Public Bargaining Cases series consists of five volumes.

109. *See, e.g.*, Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974); Kerrigan v. City of Boston, 361 Mass. 24, 278 N.E.2d 387 (1972). *See also* Drachman & Ambash, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations: A Management Perspective*, 6 J. L. & EDUC. 209 (1977); Kahn,

statutory language exists, the private sector precedents may provide analogous authority. Blind deference is unwarranted, however, unless the legislature intended the statute to be so construed.[110]

Although the private sector precedents offer some guidance, public sector issues should not be interpreted solely by reference to the private sector.[111] In fact, Pennsylvania courts have held that it is necessary to consider "the distinctions that

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Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations: The Perspective of a Neutral, 6 J. L. & EDUC. 221, 225–27 (1977).

110. For example, the California Agricultural Labor Relations Act provides that the Agricultural Labor Relations Board "shall follow applicable precedents of the National Labor Relations Act, as amended." CAL. LAB. CODE § 1148 (West Supp. 1985). In contrast, the PECBL contains no such instruction. Furthermore, State Representative Clifton Skeen, the chief House sponsor of the PECBL and the Chairman of the Ohio House Subcommittee on Commerce and Labor, in reference to the PECBL declared, "I'm fairly familiar with the National Labor Relations Act. There may be some similarities, but I don't think this bill is in any way modeled after that." United Press International, June 2, 1983, *cited in* White, Kaplan & Hawkins, *supra* note 10, at 5. This underscores the caution one should exercise before imposing private sector rulings on Ohio's public sector.

111. As one commentator has noted:

> [T]he preoccupation with the private sector system is unfortunate. Simply to import the private sector bargaining regime into the public sector would be to neglect the special role of the public employer as representative of the public interest. Moreover, even in the private sector, the NLRA model has not proved to be the panacea for labor-management problems that it once promised to be. Reliance on private sector prototypes, therefore, may transplant to the public sector the weaknesses as well as the strengths of a long-entrenched system.

Developments in the Law—Public Employment, 97 HARV. L. REV. 1611, 1681 (1984) (footnotes omitted).

There are two distinctions between the public and private sectors that must be kept in mind when using private sector precedents to construe public sector collective bargaining laws. First, unlike private business, government cannot go out of business. *But see* Chapter 9 of the Federal Bankruptcy Code, 11 U.S.C. §§ 901–46 (1982) (permitting municipal employers to resort to financial reorganization in bankruptcy under standards and procedures that closely parallel those provided under Chapter 11 for private employers). *See also* Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957, 958 n.7 (1976) (applying Chapter 11 standards to interpret Chapter 9); *Supreme Court Ruling on Bankrupt Employer's Labor Contract May Apply to Public Sector*, 22 GOV'T EMPL. REL. REP. (BNA) 470 (Mar. 5, 1984) (suggesting that public employers are reluctant to submit the conduct of government affairs to federal bankruptcy court supervision); *San Jose School District Files for Bankruptcy; Seeks to Toss Out Pacts*, 21 GOV'T EMPL. REL. REP. (BNA) 1579, 1580 (Aug. 1, 1983) (in 1983, the San Jose School District was the first governmental entity to file for bankruptcy in 40 years); *San Jose Schools Seek Dismissal of Bankruptcy Case Under Pacts*, 22 GOV'T EMPL. REL. REP. (BNA) 1081 (June 4, 1984) (the San Jose School District's bankruptcy petition was dismissed with the school board voluntarily agreeing to restore wage cuts). Government services are generally required by law because they are viewed as vital to citizens by their elected representatives. No matter how many costly concessions might be made at the bargaining table, the government agency cannot, generally, go out of business. In contrast, in the private sector a company will usually cease to exist if it conducts its labor negotiations in an irresponsible fashion. Thus, the market place is the ultimate curb to wrong decisions in the private sector but no similar economic force may exist for government decisions.

Second, government services are generally essential and monopolistic. When a government agency is closed down temporarily by a strike, the citizens may have no place else to turn for essential government services. In the private sector, however, if one company producing shoes is closed by a strike, the consumer simply buys from another company. When a government agency is faced with a shutdown due to a strike by its employees, however, considerable political pressure may be generated to keep services operating. Consequently, the agency is faced with two choices: (1) refuse to concede to union demands and run the risk of not delivering essential services to citizens, or (2) concede to union demands, thus imposing a greater burden on taxpayers.

Numerous scholars have also argued that the theoretical distinctions between the public and private sectors preclude the possibility of transplanting private sector policies and procedures to the public sector. *See, e.g.*, H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 7–32 (1971); Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look Via a Balancing Formula*, 40 MONT. L. REV. 231, 253–57 (1979); Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations*, 30 MD. L. REV. 179, 184–91 (1970); Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25, 165 (1974). *But see* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1156–57 (1974) (noting that "it does not follow from the proposition that collective bargaining in the public and private sectors is different . . . that practices in the private sector cannot be transplanted to the public sector").

necessarily must exist between legislation primarily directed to the private sector and that for public employees."[112]

In view of the differences between private and public employment[113] and the dual nature of government as both employer and governor,[114] the SERB and the courts should be cautious in using private sector precedents to construe the PECBL.[115] Where private sector precedents have been as widely criticized as the *Mackay* doctrine, the SERB and the courts should be even more reluctant to superimpose private sector doctrine upon the regulatory scheme devised by the Ohio General Assembly. Although private sector law may offer some guidance, it does not provide the definitive answer to whether Ohio public employers may permanently replace economic strikers. The limited application of private sector rulings on striker replacements to the public sector is underscored by the substantial differences between private and public sector strikes described in the next section.

E. *The Distinctions Between Private and Public Sector Strikes*

Before importing the private sector law of strike replacements into the Ohio public sector, a comparison of private and public sector strikes is appropriate to determine whether public employers have a greater or lesser claim to the potent weapon of replacement than do their private sector counterparts.[116]

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112. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 499, 337 A.2d 262, 264 (1975). The Pennsylvania Supreme Court also stated:

> We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experiences gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

Id. at 500, 337 A.2d at 264–65 (footnote omitted). *See also* Pennsylvania Labor Relations Bd. v. AFSCME, 22 Pa. Commw. 376, 348 A.2d 921 (1975); Borough of Wilkinsburg v. Sanitation Dep't, 463 Pa. 521, 525 n.5, 345 A.2d 641, 643 n.5 (1975); Lullo v. Int'l Ass'n of Fire Fighters, Local 1066, 55 N.J. 409, 440, 262 A.2d 681, 698 (1970) (noting that "the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public service").

113. *See supra* note 111.

114. *See infra* note 144.

115. It appears that the dominance of the NLRA model of collective bargaining in the public sector is giving way to approaches that attempt to respond to the duality of government's identity as both employer and governor. *Compare* MINN. STAT. ANN. § 179A.01 (West Supp. 1985) ("[U]nique approaches to . . . resolutions of disputes between public employees and employers are necessary.") *with* Act of May 26, 1965, ch. 839, § 179.50, 1965 Minn. Laws 1554, 1554–55 ("[T]he paramount interest of the public and the nature of governmental processes make it necessary to impose special limitations upon public employment.") (repealed 1971).

A good example of experimentation can be found in several states' approaches to defining bargaining units. *See, e.g.*, MINNESOTA LEGISLATIVE COMM'N ON EMPLOYEE RELATIONS, RESEARCH REPORT ON THE BARGAINING UNIT DETERMINATIONS (1979); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969); Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 OR. L. REV. 151 (1971).

116. This comparison of private and public sector strikes draws extensively upon the works of Professors Harry Wellington and Ralph Winter. *See* H. WELLINGTON & R. WINTER, *supra* note 111; Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 857–61 (1970); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969). During the late 1960s and early 1970s, Wellington and Winter examined the applicability of private sector collective bargaining practices to the public sector and argued that "all the collective bargaining practices developed in the private sector" should not be "mindlessly import[ed] into the public sector." H. WELLINGTON & R. WINTER, *supra* note 111, at 202. For criticisms of their arguments, see Cohen, *Does Public Employee Unionism Diminish Democracy?*, 32 INDUS. & LAB. REL. REV. 189 (1979). For a discussion of the theoretical distinctions between private sector and public sector employment, see *supra* note 111.

The typical public employee strike differs from the typical private sector strike in that the strike deprives members of the general public of a service which they cannot obtain from any other source, at least during the temporary period of the strike. When governments provide public goods, they normally do so as a monopoly, either as a legal or a practical matter.[117] Strikes by public sector employees result in an interruption of services to the community. The failure to satisfy the public need for services produces political pressure on public employers.[118] The striking union's objective is to generate sufficient discomfort among the general public that pressure will mount on the politicians to settle the bargaining dispute.[119] Inflicting political harm on a public employer is the ultimate lever by which a public employee union extracts concessions in collective bargaining.[120]

There are varying degrees of harm inflicted by any such interruption of public services. Some services are critical, such as police and firefighters; some are trivial, such as state lottery commission workers. On the whole, however, the services rendered by public employees are important.[121] Regardless of how these public services are characterized, strikes by each of these groups result in similar popular reaction. The public has grown accustomed to these services, it feels it needs them, and it has paid for them. Consequently, the public feels deeply aggrieved when they are interrupted. Thus, the amount of political force that a public employee union can wield may be enormous. Emotions are fanned by the media, a crisis atmosphere develops, and powerful pressure surges up on the politicians—who, after all, are elected by and are accountable to the general public—to settle the strike quickly and without much concern about the cost.[122]

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117. H. WELLINGTON & R. WINTER, *supra* note 111, at 18 ("There usually are not close substitutes for the products and services provided by government . . . ."). This may also hold true in the private sector in some situations; for example, local telephone service.

118. *Id.* at 25–26 ("The public employee strike['s] . . . sole purpose is to exert political pressure on municipal officials.").

119. *Id.* at 25 ("[B]ecause strikes in public employment disrupt important services, a large part of a mayor's political constituency will, in many cases, press for a quick end to the strike with little concern for the cost of settlement.").

120. In addition, public employee unions have a self-help measure legally available to them in attempting to inhibit the exercise of the employer's right to operate during a strike. This public employee union countermeasure is the right to initiate and fund a political campaign to oust the public officials with ultimate responsibility for management's bargaining position. *See infra* note 122. As a practical matter, unions in the private sector do not have this self-help measure available because a proxy contest to oust incumbent management because of its collective bargaining position is not likely to be successful.

121. Examples of public employees that perform important services include teachers, sanitation workers, and transit workers.

122. From a political standpoint, it may be possible to bury these costs in public accounts in such a way that they will haunt only the successors of the current officeholders. *See* H. WELLINGTON & R. WINTER, *supra* note 111, at 27.

Another argument that public employee unions have greater bargaining clout than their private sector counterparts is that public sector employees, as citizens, already have a voice in workplace decisionmaking through customary political channels. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228–29 (1977); Township of W. Windsor v. Pub. Employment Relations Comm'n, 78 N.J. 98, 111–12, 393 A.2d 255, 261 (1978); Dalton, *A Theory of the Organization of State and Local Government Employees*, 3 J. LAB. RESEARCH 163, 164–65 (1982) (asserting that public employees participate in hiring their own employer through voting); Summers, *supra* note 111, at 1160.

Some commentators have also argued that public employees organize their lobbying and voting efforts more effectively than do members of the general public. *See, e.g.*, Bellante & Long, *The Political Economy of the Rent-Seeking Society: The Case of Public Employees and their Unions*, 2 J. LAB. RESEARCH 1, 4 (1981); Bush & Denzau, *The Voting Behavior of Bureaucrats and Public Sector Growth*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 90 (T. Borcherding ed. 1977); Note, *supra* note 107, at 888–92, 921–23, 947–48.

In contrast, the private sector unions' objective is to inflict economic harm on their employers by causing a diminution in revenues through the cessation of production. Private sector unions who wield a great deal of bargaining power can inflict severe economic losses on their employers in a strike. These unions are forced to be moderate in the use of the strike weapon, however, because both the employer and the employees are ultimately exposed to the discipline of the market.[123] If the union wins unduly high wage levels for its current members, that victory increases the price of the employer's goods or services, in turn reducing the level of consumer demand. Customers will switch to less expensive substitutes, either nonunion producers of the same good or alternative products performing essentially the same function. The reduction in demand will cause the employer to substitute capital-intensive technology which is now less expensive than the cost of labor at higher wage levels. Ultimately, the unionized employees face the prospect of loss of work, and their union the loss of membership strength and dues, which should induce moderation by private sector unions in the pursuit of higher and higher wage levels.[124]

At first blush, the typical private sector unions seem to have substantially less bargaining clout than do public employee unions. The economic calculus confronting the typical public sector union is certainly much different. Unlike most consumer goods, the demand for government services is often highly inelastic. No matter how expensive policing, firefighting, hospital care, or education becomes, the general public usually feels that it must maintain at least the level of service to which it has become accustomed. The cost of wage settlements can be buried in larger government budgets which are paid by general taxes and often subsidized by higher levels of government. Thus a public union that wins a substantial pay raise will not see an immediate and visible increase in the price of the service that its members provide, nor will that victory generate perceived consumer resistance. Moreover, because the government often has a monopoly on that service, the consumers have nowhere else to go. The services that governments provide are rarely capable of delivery by labor-saving technology; even if they are, layoffs of civil servants are always touchy events.[125] The convergence of all these factors makes it seem that public employee unions do not face the same tradeoff between higher wages and unemployment for their members as do their private sector counterparts.

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123. Furthermore, the force of the post–1979 economic decline has combined with such factors as deregulation, foreign imports, and nonunion competition to reduce the economic clout of many private sector unions. These competitive influences are generally less influential in public employment. Additionally, private employers have a weapon that public employers lack. Although private employers can relocate to nonunion jurisdictions, the government of Cleveland cannot relocate to South Carolina or Hong Kong.

124. H. WELLINGTON & R. WINTER, *supra* note 111, at 15–17.

125. *See id.* at 17–21.

Although government is relatively insulated from competition, it is possible to use private contractors to perform work previously done by public employees. For example, private firms can be hired to collect garbage, perform maintenance, or even run fire departments. *See Willimantic, Conn., Fire Personnel Take Cuts to Beat Out Private Firm*, 21 GOV'T EMPL. REL. REP. (BNA) 863 (Apr. 18, 1983) (firefighters agreed to concessions to avoid the contracting out of their services). The tax laws, however, give a cost advantage to public agencies over private firms which makes contracting out less attractive than it might seem at first blush. For example, a private garbage collecting firm must pay federal and state income taxes while a public agency performing the same service does not. Likewise, a private garbage collector must borrow at market interest rates to finance purchases of capital equipment while a public agency—because of the tax laws' exemption of interest on securities issued by state and local governments—can pay below-market rates.

If that were the entire story of the difference between private and public sector strikes, then it could reasonably be concluded that public employers need more weapons to counter a strike than do their private sector counterparts in order to avoid severe wage inflation in the public work force. That, however, is not the entire picture of the relative strength of strikes in the public and private sectors. First, there are real economic costs to public employees if they decide to strike rather than take their employer's last offer: they will be without a paycheck for the duration of the strike. On the other hand, there are generally no economic costs to the public employer when its employees strike. Indeed, many public employers can actually make a profit during a strike. Tax revenues are still generated while labor costs drop sharply. Unlike a private employer, a government does not have to worry about the long-run loss of customers to strike-free competitors.[126] Thus, public employers may enjoy more leverage in resisting a striking union than do most private employers.[127]

Furthermore, there are other forces that make it easier for governments to resist expensive wage demands. Part of that force is political.[128] The business community, with the assistance of the media, has done a thorough job of informing the public about the cost of government labor contracts.[129] The public is now more budget conscious and thus more willing to tolerate loss of services during a bargaining deadlock.[130]

There are also powerful economic forces assisting the government in resisting union wage demands. The wage bill is by far the largest share of the cost in government services.[131] The era of rapid growth in government revenues to absorb

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126. Competition is sometimes virtually nonexistent in the public sector. For example, only government can provide a driver's license. Although private substitutes do exist for some services provided by government, the public service may be heavily subsidized as compared with the private substitute (*e.g.*, public versus private schools) or the private and public services are only partial substitutes (*e.g.*, private cars versus public transit).

127. The fact that public employee unions do not possess as much economic clout as their private sector counterparts is corroborated by studies of union/nonunion wage differentials. During the 1970s, private sector union/nonunion wage differentials widened substantially. In the public sector, however, unionization has not been associated with widening wage differentials. Studies have shown that, during the 1970s, in the public sector average wages in unionized jurisdictions did not rise relative to those of nonunion jurisdictions. D. MITCHELL, CONCESSION BARGAINING IN THE PUBLIC SECTOR: A LESSER FORCE 5 (Working Paper Series—74) (Aug. 1984); Mitchell, *Unions and Wages in the Public Sector: A Review of Recent Evidence*, 12 J. COLLECTIVE NEGOTIATIONS 337, 338–40 (1983).

128. *See* Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C.L. REV. 155, 159–62 (1977) (discussing the adverse economic and hostile political climate that has limited the ability of public employee unions to prevail at the bargaining table and that has made it politically popular for politicians to resist union demands).

129. *See, e.g.*, Katz, *Municipal Pay Determination: The Case of San Francisco*, 18 INDUS. REL. 44, 49–58 (1979) (discussing the role of business groups in limiting the wages of municipal employees in San Francisco).

130. Summers, *supra* note 111, at 1165–68 (arguing that insofar as wages are concerned, public employees are a peculiarly disadvantaged interest group—one that stands alone against the multitude of voters who want to maximize services while minimizing costs).

The public's reaction to the strike of the Professional Air Traffic Controllers Organization (PATCO) in 1981 and President Reagan's discharge of the strikers demonstrated that the public would support a hard management line in government bargaining with unions. *See Harris Poll Finds Most Oppose the Air Strike*, New York Times, Aug. 21, 1981, at A18; *Most in Poll Oppose Public Worker Strikes*, New York Times, Aug. 16, 1981, at 39. For discussions of the PATCO dispute, see Dickinson, *The Unmaking of a Union*, 12 J. COLLECTIVE NEGOTIATIONS 259 (1983); Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984). Another example of strong public sentiment against concessions to public sector unions occurred in San Francisco in the mid-1970s. *See* Katz, *supra* note 129, at 55–57; *see also* Raskin, *Conclusion: The Current Political Contest*, in PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 203, 205–10 (A. Chickering ed. 1976) (describing public sentiment against concessions to public sector unions in San Francisco and elsewhere).

131. Employee wages and benefits constitute more than 60% of most public sector budgets. *See* D. STANLEY,

higher payroll costs has ended.[132] It is wrong to think that public officials can easily raise taxes to pay for collective bargaining contract wage increases.[133] There is great public sensitivity to the higher tax bills resulting from a bargaining settlement. An immediate public outcry goes up at sharp increases in municipal mill rates, water and sewage charges, tuition fees, and the like.

In the normal course of events, these changing public sentiments are transmitted through elections in which politicians must compete for votes on the basis of their relative postures on industrial peace and financial restraint. In many states, including Ohio,[134] there is an additional instrument which can make a profound difference in that calculus: the taxpayer initiative.[135] The general public, in a vote in which the interested government employees could be outnumbered by more than 10 to 1,[136] can establish a fixed limit on the funds available to pay higher government wages or upon the wage levels themselves. That limit is constitutionally binding and cannot be changed until another initiative passes. Public officials legally cannot ignore the limit even if the union persuades them that a wage increase is justified. It is not feasible for the union to bargain with the floating electorate to change its mind. The union members could strike to express their frustrations with their employer's inability to raise wages, but that would deprive employees of their paychecks without producing

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MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 120 (1972) (payroll costs constitute 60–70% of municipal budgets); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409, 413 (1973) (employee compensation makes up approximately 65% of public school budgets).

132. State and local government expenditures increased from 8.4% of the gross national product in 1957 to 13.2% in 1977. COMMITTEE ON ECONOMIC DEVELOPMENT, IMPROVING MANAGEMENT OF THE PUBLIC WORK FORCE: THE CHALLENGE TO STATE AND LOCAL GOVERNMENT 28–31, 33 (1978), *reprinted in* H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 6 (2d ed. 1979). Beginning in the mid-1970s, however, the economic fortunes of state and local governments suffered a dramatic reversal. *See Public Worker Outlook Austere; Fiscal Pressures Are Mounting*, 915 GOV'T EMPL. REL. REP. (BNA) 26–27 (June 1, 1981) (budget deficits plagued a majority of the nation's largest 275 cities during the 1979–1981 period); *BNA Special Survey: RIFS, Layoffs, and EEO in State Governments*, GOV'T EMPL. REL. REP. (BNA) at 3 (Feb. 1, 1982) (during fiscal year 1982, governments in 44 states resorted to layoffs); Anderson & London, *Collective Bargaining and the Fiscal Crisis in New York City: Cooperation for Survival*, 10 FORDHAM URB. L.J. 373, 392 (1982) (during the second half of the 1970s, New York City reduced its workforce by 20% and its total budgetary expenditures by 21%).

133. Because wages constitute a large part of a public employer's operating budget, employees' wage proposals are immediately "visible and . . . susceptible to focused resistance." Summers, *supra* note 111, at 1166.

134. OHIO CONST. art. II, § 1(a).

135. The best-publicized examples of taxpayer-initiated referenda limiting tax revenues were Proposition 13 in California, CAL. CONST. art. XIIIA, and Proposition 2–1/2 in Massachusetts, MASS. ANN. LAWS ch. 59, § 21C (Michie/Law. Coop. Supp. 1985). *See Tax-Trimming Measure Passes in Mass.; 6 Other States Nix Similar Referenda*, 889 GOV'T EMPL. REL. REP. (BNA) 12, 12–13 (Nov. 24, 1980). *See also infra* note 137.

The preemption provision of the PECBL, OHIO REV. CODE ANN. § 4117.10(A) (Page Supp. 1984), *see infra* notes 226–33 and accompanying text, would not apply to constitutional amendments approved pursuant to the initiative process because a state constitutional provision would take precedence over any conflicting law. Other jurisdictions are divided as to whether the bargaining law or the referendum provision prevails when the voter referendum adopts a legal restriction short of a state constitutional amendment. *Compare* San Francisco Fire Fighters, Local 798 v. Bd. of Supervisors, 96 Cal. App. 3d 538, 548–50, 158 Cal. Rptr. 145, 149–51 (1979) (amendment to city charter approved by referendum takes precedence over bargaining law) *with* AFSCME Council 75, Local 350 v. Clackamas County, 687 P.2d 1102, 1108–11 (1984) (bargaining law prevails over civil service law providing that changes in employment conditions be approved in a local referendum).

136. In Ohio, for example, there were 582,000 state and local government employees in 1984, compared to 7,846,000 residents of voting age, a ratio of more than 1 to 13. *See Summary of Civilian Government Employment and Payrolls, by State: October 1984*, 23 GOV'T EMPL. REL. REP. (BNA) 1271 (Sept. 2, 1985) (151,000 state employees and 431,000 local employees); Bureau of Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 252 (1985) (7,846,000 Ohio residents, 18-years-old and over).

any tangible results. This strategic "doomsday weapon" has no analog in the private sector, where, as the union knows, employers have the authority to offer more money if raising wage rates is less costly than a strike.

Furthermore, as labor costs go up, politicians in this Proposition 13 era[137] realize that they can win votes and public support by eliminating costly frills and by introducing labor-saving technology.[138] It is no longer the case, if it ever was, that a government job carries life-time tenure and immunity from layoffs.[139] The more stringent economic parameters shaping government wage determination have produced a considerably more elastic demand curve for public labor.[140] Public sector unions are beginning to experience the tradeoff between higher wages and fewer jobs for their members.[141]

The model which emerges from this view of the effectiveness of public employee union strikes is vastly different from the model sketched by Professors Wellington and Winter fifteen years ago.[142] These new parameters on public sector bargaining strongly suggest that public employers should have fewer weapons at their disposal in the event of a strike than private employers have, if the public employer and the representative of its employees are to stand in a position of relative equality.

This, however, does not conclude the analysis of the distinction between private and public strikes in determining what replacement rights public employers should have during economic strikes. The final consideration is the nature of the services that public employers provide. Public employers are generally monopoly suppliers of services to the community. Moreover, governments provide services that the public, through its elected representatives, has determined that it needs and wants government to provide. In contrast, there are often alternative sources for the products and services that private employers supply. Consequently, when operations are inter-

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137. CAL. CONST. art. XIIIA. Proposition 13 eliminated approximately seven billion dollars in property tax revenues that would have been available to municipal governments in California. For a description of Proposition 13, see Swimmer, *The Impact of Proposition 13 on Public Employee Relations: The Case of Los Angeles*, 11 J. COLLECTIVE NEGOTIATIONS 13 (1982).

138. *See* Sackman, *supra* note 128, at 159 ("Taxpayer opposition to the cost of public services has been mounting steadily. The public has reacted strongly to the perception that inept managers have 'given away the shop.' In order to make known their dissatisfaction, taxpayers have resorted to the political process to override the collective bargaining process."); Vaughn & Dozier, *Public Sector Bargaining Issues in the 1980's: A Neutral View*, in PROCEEDINGS OF NEW YORK UNIVERSITY 33RD ANNUAL NATIONAL CONFERENCE ON LABOR 317, 318 (R. Adelman ed. 1981) ("[T]he political balance has shifted. It used to be that elected officials were pushed toward easy settlements with public employee unions. Now, pressures are pushing those officials away from costly settlements, and elected officials are beginning to find it 'good politics' to be at least perceived as tough bargainers.").

139. For example, the number of public employees declined by nearly half a million between 1980 and 1983. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS STATISTICS FOR THE UNITED STATES 45 table B–1 (Feb. 1984).

140. The notion of an inelastic demand for government services has been at least partially debunked in recent years as government has responded to public demand for lower taxes and lower government expenditures by reducing the level of services. *See* Anderson & London, *supra* note 132, at 381–84; Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 362–63 (1972).

141. *See BNA Special Survey: RIFS, Layoffs, and EEO in State Governments*, GOV'T EMPL. REL. REP. (BNA) at 3 (Feb. 1, 1982). One study has found that economic distress and threatened layoffs result in concession bargaining in the public sector just as they do in the private sector. Furthermore, concession bargaining was concentrated in four states—Ohio, Pennsylvania, Michigan, and Oregon—where the 1979 to 1983 recession cut most deeply into the tax base. D. MITCHELL, *supra* note 127, at 15–18, 23.

142. Compare text accompanying notes 126–41 *supra* with text accompanying notes 116–25 *supra*.

rupted in the private sector, the impact on the general public is usually less severe than when public sector operations are interrupted.[143] Therefore, one can argue that the public employer should have the right, if not the obligation, to attempt to continue operating and providing services to the public during a strike. Satisfying the public need for governmental services may require the hiring of replacements for striking workers.

The two broad distinctions between public and private sector strikes suggest conflicting responses to the question of whether public employers should have a greater or lesser right to replace economic strikers than their private sector counterparts. On the one hand, the fact that strikers generally exert less economic pressure on public employers than on private employers suggests that public employers have less need for the replacement weapon. On the other hand, since public employee union strikes may result in termination of services to the community by a monopoly supplier, a powerful argument may be made that the public employer should have a greater right to replace economic strikers.[144] Thus, a comparison of private and public sector strikes does not provide a definite answer to the question of what replacement rights public employers should have. The answer, if one exists, must lie elsewhere.

F. *The Distinctions Between the Right to Strike Under the NLRA and the PECBL*

An examination of the distinctions between the right to strike under the NLRA and the PECBL casts doubt upon the appropriateness of applying the *Mackay* doctrine in the Ohio public sector. In marked contrast to the NLRA,[145] the PECBL imposes substantial limitations on the right to strike,[146] demonstrating the Ohio General Assembly's view that a strike in the public sector is a highly dangerous weapon. The thrust of the PECBL is to confine the use of the strike weapon to economic interest disputes.[147] Strikes arising out of recognition disputes,[148] contract

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143. Of course, private sector strikes can sometimes discomfort substantial portions of the public, can occur in a monopoly situation, and can sometimes generate substantial political pressure for a settlement. On the other hand, some public sector strikes may have less of an effect on the public, may affect only a small part of the public, or may affect only those with little political clout. *See also supra* note 117.

144. A public employer is not merely an employing entity like a private company; it is charged with the constitutional responsibility of protecting the public interest through the providing of essential services to the community. Whereas in the private sector there exist only two essential parties—the employer and the union—whose interests must be reconciled, in the public sector there is an additional party: the public. Harmonizing public employees' collective bargaining rights with the public's right to receive public services requires a full appreciation of the public employer's dual identity as employer and political entity.

In order to best accommodate this triad of competing interests, public sector strikes must be examined in their own right instead of simply conceiving of them in terms of the differences from the private sector.

145. *See, e.g.*, 29 U.S.C. § 163 (1982) ("Nothing in [the NLRA], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.").

Congress, through a series of legislative enactments, not only granted private sector employees a right to strike, but also deprived employers of their traditional remedies of injunction and damage suits. *See* 38 Stat. pt. I 730 (1914) [Clayton Antitrust Act], codified as amended at 15 U.S.C. §§ 15, 17, 26 (1982), 29 U.S.C. § 52 (1982); 47 Stat. pt. I 70 (1932) [Norris-LaGuardia Act], codified at 29 U.S.C. §§ 101–115 (1982); 44 Stat. pt. II 577 (1926) [Railway Labor Act], codified as amended at 45 U.S.C. §§ 151–188 (1982); 49 Stat. pt. I 449 (1935) [Wagner Act], codified as amended at 29 U.S.C. §§ 141–197 (1982).

146. *See supra* text accompanying notes 13–33.

147. *See supra* text accompanying notes 26–31.

148. OHIO REV. CODE ANN. § 4117.11(B)(5) (Page Supp. 1984) (prohibiting recognition strikes).

grievances,[149] employer unfair labor practices,[150] and jurisdictional disputes[151] are therefore barred. Even when strike action is legitimate, a series of formal procedural steps must first be completed: a notice to bargain, good faith bargaining, government mediation, fact-finding, and, finally, a ten-day strike notice.[152] The Ohio General Assembly has been remarkably ambitious in its use of the law to limit collective employee action.

Congress has demonstrated a far different attitude toward employee work stoppages. Its hands-off attitude is illustrated by the facts in *NLRB v. Washington Aluminum Co.*[153] There, a small group of workers arrived at their machine shop one morning and found it very cold due to a malfunctioning furnace. When the employees decided to walk off their jobs the employer discharged them. The employees filed unfair labor practice charges under the NLRA.[154] Ultimately, the United States Supreme Court upheld their claim, finding that the employer had violated the NLRA and ordering reinstatement of the employees.[155] The Court held that the employer had interfered with the employees' legally protected right to engage in "concerted activities" under section 7 of the NLRA,[156] notwithstanding the fact that there was no union representing the employees, no system of formal negotiations, and no communication by the employees that morning with the employer (who would have told them that the furnace was being fixed).[157] Thus, private sector law views a strike as a natural, affirmative right of workers to engage in even spontaneous work stoppages to protest their employment terms and conditions.[158] Only grudgingly and sparingly have restrictions been placed on that right in the fifty-year history of the NLRA.[159]

The legal attitude of the PECBL towards public sector strikes in Ohio is far removed from that of the NLRA. If the workers at Washington Aluminum had wanted to walk off their jobs as public employees in Ohio, they would have had to go to a union, become members, be formally certified by the SERB after an election (or be voluntarily recognized by the employer),[160] have the union deliver a written notice to bargain,[161] negotiate in good faith with the employer to try to settle a full collective agreement,[162] complete a process of government mediation and fact-finding,[163] and

149. *Id.* § 4117.09(B)(1) (requiring all collective bargaining agreements to contain a grievance procedure); *id.* § 4117.15(A) (prohibiting strikes during the term of a collective bargaining agreement).

150. *Id.* § 4117.15(B) (employer unfair labor practice not a defense to an injunction action to halt the strike).

151. *Id.* § 4117.11(B)(4).

152. *See supra* text accompanying notes 18–25.

153. 370 U.S. 9 (1962).

154. *Id.* at 11–12.

155. *Id.* at 18.

156. 29 U.S.C. § 157 (1982). Section 7 grants employees the right to engage in concerted activities for the purpose of mutual aid or protection. Section 8(a)(1) prohibits employers from interfering with the exercise of this right. *Id.* § 158(a)(1).

157. NLRB v. Washington Aluminum Co., 370 U.S. 9, 15–16 (1962).

158. As President Reagan has written, "we have the right as free men to refuse to work for just grievances: the strike is an inalienable weapon of any citizen." R. REAGAN & R. HUBLER, WHERE'S THE REST OF ME? 138 (1965).

159. 2 C. MORRIS, *supra* note 39, at 1002–06.

160. OHIO REV. CODE ANN. § 4117.05 (Page Supp. 1984).

161. *Id.* § 4117.14(B).

162. *Id.* § 4117.11(B)(3).

163. *Id.* § 4117.14.

then give a ten-day notice to the employer and the SERB of their intention to strike.[164] At that point the employees could legally walk off their jobs to protest the furnace malfunction. (Presumably, by that time the funace would have been repaired; certainly winter would be over.) Even then, the right to strike is not guaranteed. If the union had won a contract settlement and a collective bargaining agreement were in effect, strike action would be absolutely banned.[165] The employees would have to file a grievance about the furnace and take it to arbitration.[166] The right to strike under the PECBL, therefore, is highly circumscribed.

In the private sector, employees are generally free to engage in an economic strike at any time without providing any notice if there is no collective bargaining agreement in existence.[167] Under the PECBL, an economic strike may occur only after the union has bargained in good faith, undergone governmental mediation and fact-finding, and given a ten-day notice to the employer and the SERB.[168] Moreover, a strike may not occur under the PECBL during the term of a collective bargaining agreement,[169] and public employees may not strike unless they are represented by a labor organization.[170]

The right of employers to wage economic war is also more limited under the PECBL. Private employers may lawfully implement both offensive and defensive lockouts.[171] In Ohio, public employers are expressly prohibited from engaging in any kind of a lockout.[172]

Unlike the Congress, the Ohio General Assembly did not intend to leave the collective bargaining process to "the free play of economic forces."[173] Consequently, it seems unlikely that the Ohio General Assembly contemplated the private sector precedents condoning, if not encouraging, economic warfare to be superimposed upon the collective bargaining process fashioned by the PECBL.

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164. *Id.* § 4117.14(D)(2).

165. *Id.* § 4117.15(A).

166. This scenario assumes, of course, that the malfunctioning furnace did not result in an abnormally dangerous or unhealthful working condition. If the workers had a good faith belief that working under such conditions was abnormally dangerous or unhealthful, then the work stoppage would not be considered a strike and there would be no restrictions on their right to cease working. *Id.* § 4117.01(H).

167. Under section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982), a union that desires to terminate or modify an existing collective bargaining agreement may not strike for 60 days after giving written notice to the employer or before the termination date of the agreement, whichever date occurs later. *Id.* § 158(d)(1), (4). In addition, the union must notify the appropriate federal and state mediation agencies within 30 days of notification to the employer. *Id.* § 158(d)(3). In the health care industry, section 8(d) requires longer cooling off periods of 90 days and 60 days. *Id.* § 158(d)(A). Furthermore, section 8(g) requires a union to give a health care institution a 10-day notice of its intent to strike. *Id.* § 158(g).

168. OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1984).

169. *Id.* §§ 4117.15(A), .18(C).

170. *See supra* note 31.

171. *See, e.g.*, Botsford Concrete Co., 185 N.L.R.B. 804 (1970) (single-employer defensive lockout); NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.), 353 U.S. 87 (1957) (multi-employer defensive lockout); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (single-employer offensive lockout); NLRB v. Brown, 380 U.S. 278 (1965) (multi-employer defensive lockout).

172. OHIO REV. CODE ANN. § 4117.11(A)(7) (Page Supp. 1984).

173. NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

IV. The Legislative History and the Provisions of the PECBL Relevant to the Striker Replacement Issue

The PECBL is silent on the right of public employers to replace either temporarily or permanently lawful economic strikers. The NLRA is also silent on this issue, but the Supreme Court has construed it to permit the permanent replacement of lawful economic strikers.[174] This section reviews the legislative history, analyzes the statutory scheme devised by the Ohio General Assembly, and concludes that neither provides a definitive answer to whether public sector economic strikers may be replaced.

The Ohio General Assembly apparently did not address the question of striker replacements while the PECBL was under consideration. The Ohio Legislative Service Commission was not asked to research the question nor was it asked to draft any proposed amendments expressly permitting or prohibiting strike replacements.[175] Furthermore, two legislative aides actively involved in the enactment of the PECBL have no recollection of any discussion of the issue by either proponents or opponents of the PECBL.[176]

Although no legislator apparently focused on the issue, two witnesses testifying before legislative committees considering the bill expressly addressed striker replacements.[177] An opponent of the bill urged that it be amended to include a provision recognizing the right of public employers to replace economic strikers,[178] while a proponent of the bill asked that it be amended to include a prohibition on the hiring of strike replacements.[179] The legislature's failure to respond to either of these conflicting requests for explicit language on the striker replacement issue provides no guidance on the proper construction of the PECBL.

Furthermore, the few commentators who have noted the PECBL's silence on the replacement issue have refrained from taking a definite position. Two articles have suggested, however, that permanently replacing lawful economic strikers may be an

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174. *See supra* text accompanying notes 44–48.

175. Interview with Richard E. Masek, Principal Research Associate for the Ohio Legislative Service Commission (Aug. 1, 1985).

176. Telephone interview with Malcolm Porter, legislative aide to the bill's Senate sponsor State Senator Eugene Branstool (Aug. 2, 1985); telephone interview with John Looman, legislative aide to the bill's House sponsor State Representative Clifton Skeen (Aug. 2, 1985).

177. No transcripts of legislative committee hearings are prepared. All submitted written testimony is retained, however. A thorough reading of all written testimony revealed only two references to striker replacements. *See infra* notes 178 & 179 and accompanying text.

178. Testimony of Frank H. Stewart, a management lawyer with Taft, Stettinius & Hollister in Cincinnati, Ohio, before the Senate Commerce and Labor Committee (Apr. 6, 1983):

> The bill also prescribes an inequality of bargaining power. Most public employees may strike, but the public employer may not lock out. Further, in the private sector, employers may replace economic strikers. This has long been held as the counterpoint of the union's right to strike. There is no provision recognizing such a right in SB 133. Public employers should be entitled to no less than their private counterparts.

Id. at 13.

179. Testimony of Robert J. Repas, a member of the Elyria, Ohio Board of Education, before the House Commerce and Labor Committee (June 2, 1983): "Just as the Bill protects the public position by requiring penalties against employees engaging in an illegal job action, so must the Bill include prohibitions, with penalties, against employers hiring replacements for employees on legal strikes." *Id.* at 4.

employer unfair labor practice.[180] A third has merely noted that the PECBL does not expressly address the issue.[181]

The overall structure and specific provisions of the PECBL can be used to argue either for or against permanent striker replacements. The absolute prohibition on employer lockouts[182] provides three possible grounds for arguing that the PECBL should be construed to permit employers to replace lawful strikers either temporarily or permanently, or both. First, one possible rationale for prohibiting employers from locking out is to prevent them from bringing services to a halt, presumably on the basis that public services are too important and must be maintained to protect the public's health, safety, and welfare. Because the lockout prohibition may evince a legislative desire to maintain public services even though it may result in a diminution of the employer's bargaining power, one could argue that permitting public employers to replace strikers would likewise serve the Ohio General Assembly's overriding concern for maintaining public services even though replacement may result in a diminution of the employees' bargaining power.

Second, the lockout prohibition takes away management's ability to force a strike or to control the timing of a strike. Consequently, as the legislature should have foreseen,[183] most strikes will be timed to occur at the most critical time. For example, most strikes in treasurers' offices will occur at tax time, most strikes in county engineers' offices will occur when heavy snows are forecast, and most strikes in auditors' offices will occur when the budget is being prepared or when books are being closed.[184] Because the lockout prohibition guarantees that most strikes will be timed to occur when services are most desperately needed, one can argue that the legislature intended for management to have the right to replace strikers in order to maintain public services at these critical times.

Finally, because the PECBL is modeled somewhat after the NLRA,[185] one could infer that the legislature assumed that public employers would be entitled to the same economic weapons that their private counterparts have, unless such weapons were expressly prohibited by the PECBL. Lockouts, for example, are permitted under the

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180. O'Reilly & Gath, *supra* note 10, at 926 ("Replacement workers could be hired, but the tone of the statute suggests that they will not be permanent."); *id.* at 926 n.370 ("Query if a union can win an unfair practice 'coercion' charge premised on such replacement action by the public employer."); *Public Sector Collective Bargaining: One Year After*, 41 COLUMBUS BAR ASS'N BAR BRIEFS 4, 6 (March 1985) ("Several management representatives also have expressed concern about an employer's ability to hire permanent replacements during a legal, economic strike. By one reading of the law, such action could be an unfair labor practice.").

181. Note, *supra* note 10, at 244 ("Another important difference between the new Ohio law and the federal labor relations law is the Ohio Act's silence on the question of whether a public employer is permitted to hire permanent replacements.") (footnote omitted).

182. OHIO REV. CODE ANN. § 4117.11(A)(7) (Page Supp. 1984). This section provides:

> It is an unfair labor practice for a public employer, its agents, or representatives to: . . . (7) Lock out or otherwise prevent employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the employer's terms regarding a labor relations dispute . . . .

Id.

183. *See* testimony of Greg Van Ho, Director of Personnel & Purchasing for Medina County Commission, before the House Commerce and Labor Subcommittee (June 1, 1983), at 3 (testifying that lockout prohibition will result in strikes being timed to inflict the most harm on the public).

184. *Id.*

185. *But see supra* note 110.

NLRA[186] but are expressly prohibited by the PECBL.[187] Consequently, according to this argument, if the legislature had not intended for public employers to have access to the replacement weapon, it would have expressly prohibited that weapon. This argument has particular force in view of the fact that the right to replace is so well established in the private sector.[188]

Another section of the PECBL, however, supports arguments against permanent strike replacements. The PECBL instructs the SERB and the courts how to interpret it whenever there are any ambiguities. The PECBL "shall be construed liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees."[189] Under this mandate, the SERB and the courts must determine what construction of the PECBL concerning strike replacements will best promote good relationships between public employers and their employees. The effect this provision has in the context of striker replacements may depend upon the kind of "relationships" the provision is construed to promote.

One possible reading is that it means "bargaining" relationships. If so, then this section may become a vehicle for the SERB and the courts to deny and grant economic weapons to each side depending upon relative bargaining power, since it is generally agreed that in a system of collective bargaining the employer and the employees' representative must stand in a position of relative equality.[190] Under this reading, the SERB and the courts may believe they have authority to redress any bargaining relationship inequalities. As a result, employers will be granted the right to replace if they are perceived to be the weaker party and be denied that right if they are perceived to be the stronger party. In the public sector, strikes are generally less harmful economically to employers because tax revenues continue to accrue while the strikers are not receiving paychecks.[191] Thus, in order to equalize "bargaining" relationships, the SERB would probably deny permanent strike replacements.

Alternatively, the term "relationships" in the PECBL's liberal construction may be read to mean "employment" relationships. Under this reading, the SERB and the courts would be compelled to deny employers the right to replace. Nothing could be more disorderly and destructive of employment relationships than the existence of permanent replacements on the job. During the strike, it is inevitable that there will be disorder, and perhaps even violence, as strikers watch others cross the picket line to render the strike ineffective and to take their jobs, perhaps permanently. After the strike, permanent replacements and returned or reinstated strikers will be forced to work together. It is difficult to conceive of a situation more fraught with the potential

186. *See supra* note 171.

187. *See supra* note 182.

188. *See supra* note 48.

189. OHIO REV. CODE ANN. § 4117.22 (Page Supp. 1984). One commentary has opined that this provision "may have unexpected and wide-reaching effects." J. LEWIS & S. SPIRN, *supra* note 10, at 117.

190. *See, e.g.*, Comment, *Anti-Strikebreaking Legislation—The Effect and Validity of State-Imposed Criminal Sanctions*, 115 U. PA. L. REV. 190, 215 (1966) ("collective bargaining . . . is promoted when the two parties are of relatively equal strength").

191. *See supra* text accompanying notes 126–27.

for destructive relationships. For the permanently replaced strikers, their employment relationship has been indefinitely, and perhaps permanently, severed. It is difficult to imagine how the permanent replacement of strikers could result in the promotion of "orderly and constructive relationships between all public employers and their employees." Thus, in order to promote orderly and constructive "employment" relationships, this reading of section 4117.22 would deny permanent striker replacements.

In sum, an examination of the legislative history, the lockout prohibition, and the liberal construction mandate provides inconclusive and conflicting answers to the striker replacement question. No member of the Ohio General Assembly apparently focused on the issue, and the two witnesses testifying before legislative committees on the matter apparently drew conflicting inferences from the bill's silence—one witness inferring that the bill permitted striker replacements and the other inferring that it did not. The lockout prohibition can be the basis for an argument permitting striker replacements, but an opposing argument can be made that a liberal construction of the PECBL would prohibit striker replacements. Thus, we must look elsewhere for an answer to the striker replacement issue.

V. The Effect of the Ohio Civil Service System on the Public Employer's Right to Replace Economic Strikers

The uncertain relationship between the PECBL and the Ohio civil service system complicates the task of determining the proper construction of the PECBL. The Ohio General Assembly has established a hierarchy that gives precedence to the PECBL over the civil service system whenever there is a conflict.[192] As has been discussed, however, no express provision or clear legislative intent exists concerning the striker replacement issue[193] that would prevail over any conflicting civil service provision. The civil service laws generally impose significant constraints on the freedom of Ohio public employers to make personnel moves such as discharges, replacements, and transfers. If applicable, the civil service laws would severely limit the employer's ability to respond to a strike and to make the personnel changes necessary to maintain services during a strike. This section first reviews the civil service provisions that would appear to restrict the employer's ability to respond to a strike. Although a strong argument can be made that the Ohio civil service laws preclude public employers from permanently replacing most economic strikers, this section concludes that applying the civil service laws to employer replacement of strikers so undermines the regulatory scheme of the PECBL that a conflict between the civil service system and the PECBL concerning the striker replacement issue should be inferred.[194] Thus,

192. Ohio Rev. Code Ann. § 4117.10(A) (Page Supp. 1984).

193. *See supra* Section IV.

194. For discussions of the statutory preemption issue generally, see Alleyne, *Statutory Restraints on the Bargaining Obligation in Public Employment*, in Labor Relations Law in the Public Sector 100, 109–11 (A. Knapp ed. 1977); Sackman, *supra* note 128, at 169–72, 179–81; Schmedemann, *The Scope of Bargaining in Minnesota's Public Sector Labor Relations: A Proposal for Change*, 10 Wm. Mitchell L. Rev. 213, 229–39, 253–58 (1984).

public employers should not be bound by civil service restrictions on personnel actions during the course of a lawful economic strike.

Public employment in Ohio is governed generally by a comprehensive statutory civil service system[195] based on merit and fitness mandated by the Ohio Constitution.[196] Civil service employees are divided into two groups, classified[197] and unclassified.[198] This comprehensive civil service system and the rights it affords classified civil service employees will have an impact on any attempt by a public employer to replace striking public employees, unless the PECBL has preempted the civil service system during lawful economic strikes.

A. *Permanent Replacement of Striking Employees*

If the civil service laws apply, permanent replacement generally would not appear to be a legally available response by the public employer to an economic strike. To determine the legality of permanent replacement under the civil service laws, the starting point is that lawfully appointed public employees[199] in Ohio have a statutory right to continued employment and can be reduced in position, suspended, or removed from their jobs only for just cause.[200] Employee participation in a lawful economic strike should not constitute the requisite just cause for reduction in position,

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195. OHIO REV. CODE ANN. § 124.01(A) (Page 1984) defines civil service as "all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof." The civil service system is governed by *id.* §§ 124.01–.99 (Page 1984 & Supp. 1984).

196. OHIO CONST. art. XV, § 10 (adopted Sept. 3, 1912) provides that "[a]ppointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

197. Classified service is defined as "the competitive classified civil service of the state, the several counties, cities, city health districts, general health districts, city school districts thereof, and civil service townships." OHIO REV. CODE ANN. § 124.01(C) (Page 1984). "The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service." *Id.* § 124.11(B) (Page Supp. 1984).

198. The unclassified service is comprised of positions exempt from the examination requirement of chapter 124 of the Ohio Revised Code. *Id.* § 124.11(A) (Page Supp. 1984). The positions include elected officers, employees of the board of elections, members of boards and commissions, heads of departments, commissioned and noncommissioned officers and enlisted men, superintendents, teachers, principals, bailiffs, official stenographers, assistants to the attorney general, students, and employees of the governor's office. *Id.*

199. There are two types of lawful appointments, certified and provisional. A certified appointment is made in the following manner: (1) a competitive exam for a classification is given; (2) an eligible list is prepared of all the persons taking the test who receive the minimum grade; (3) an appointing authority notifies the director of Administrative Services that there is a position to be filled; (4) the director certifies to the appointing authority the names and addresses of the three candidates standing highest on the list; and (5) the appointing authority fills the position by appointing one of the three persons certified to him. *Id.* §§ 124.26, .27 (Page 1984).

A provisional appointment occurs when there is no eligible list for a classification. Since the director cannot certify names of persons eligible to fill the position, the appointing authority may nominate a person to the director for a noncompetitive examination. The director certifies that person as qualified, and she is appointed provisionally to fill the vacancy. *Id.* § 124.30(A).

200. The statute states that:

> [t]he tenure of every officer or employee in the classified service of the state . . . holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

Id. § 124.34.

suspension, or removal.[201] If lawfully striking employees cannot be suspended or removed from their jobs, however, the civil service laws prohibit employers from acquiring permanent replacements to fill the strikers' positions. Under the civil service statute, a permanent replacement can be appointed only when there is a "position to be filled"[202] or a "vacancy."[203] Because these terms have been narrowly defined,[204] an employee's participation in a lawful strike should not create a vacancy or a position to be filled. Thus, because the civil service laws do not permit permanent appointments to government jobs unless there is a vacancy and because the just cause provision precludes employers from ousting lawfully striking employees to create a vacancy, the civil service system—if not preempted by the PECBL—would bar the permanent replacement of tenured employees engaged in a lawful economic strike.

The permanent replacement of striking probationary employees,[205] however, could be accomplished under the Ohio civil service laws.[206] Probationary employees do not have the civil service statutory protections afforded to tenured employees.[207] Public employers have broad discretionary powers in removing probationary employees,[208] which are subject to very limited review.[209] Once the probationary employee

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201. Striking is not a statutory cause for removal. *See id.* Furthermore, engaging in a lawful strike should not constitute "failure of good behavior" or "neglect of duty." Failure of good behavior is defined as "behavior contrary to recognized standards of propriety and morality, misconduct, wrong conduct, all of which constitute and are the equivalent of conduct unbecoming an officer or employee of the city." State *ex rel.* Ashbaugh v. Bahr, 68 Ohio App. 308, 313, 40 N.E.2d 677, 680 (Mahoning County Ct. App. 1941). Although strikes prohibited by the now-repealed Ferguson Act, OHIO REV. CODE ANN. § 4117.02 (*repealed* Apr. 1, 1984), were held to constitute "neglect of duty," Diebler v. Denton, 49 Ohio App. 2d 303, 304, 361 N.E.2d 1072, 1074 (1976), it seems unlikely that an employee engaging in a lawful strike will be "considered to have abandoned and terminated his appointment or employment . . . ." OHIO REV. CODE ANN. § 4117.05 (*repealed* Apr. 1, 1984). *But see* Local 1494, International Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978) (holding that a refusal to report to work when ordered to do so gave the employer cause to discharge firefighters engaged in a lawful strike).

202. "The head of a department, office, or institution in which a position in the classified service is to be filled [shall appoint a permanent replacement]." OHIO REV. CODE ANN. § 124.27 (Page 1984).

203. *Id.* §§ 124.271, .30(A), .31(A).

204. *See, e.g.*, State *ex rel.* Chapman v. Lesser, 94 Ohio St. 387, 402, 115 N.E. 33, 36 (1916) (a permanently suspended firechief's position was not "vacant" until a valid and final judgment concerning his permanent suspension had been entered); State *ex rel.* Baker v. Lea, 10 Ohio N.P. (n.s.) 364, 368 (Cuyahoga C.P. 1910) (a position is not "vacant" unless the incumbent employee has no "lawful right to continue therein"), *aff'd* 83 Ohio St. 518, 94 N.E. 1109 (1911).

The Ohio Administrative Code contains the following definition:

> "Available vacancy"—Means an existing funded position, not currently filled by an incumbent which the appointing authority desires to fill. The existence of vacant positions on an appointing authority's table of organization or roster of positions shall not mean that a position is an available vacancy.

OHIO ADMIN. CODE § 123:1–47–01(A)(9) (1984 Supp.).

205. "All original and provisional appointments, including provisional appointments made pursuant to section 124.30 of the Revised Code, shall be for a probationary period, not less than sixty days nor more than one year . . . ." OHIO REV. CODE ANN. § 124.37 (Page 1984).

206. This analysis ignores the impact of the PECBL and whether the removal of a lawfully striking probationary employee would violate *id.* § 4117.11(A)(1) (Page Supp. 1984), which prohibits employer interference, restraint, or coercion of employees exercising their statutory rights.

207. "If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period after completion of sixty days or one-half of his probationary period, whichever is greater." *Id.* § 124.27 (Page 1984).

208. Hill v. Gatz, 63 Ohio App. 2d 170, 410 N.E.2d 1268 (Cuyahoga County Ct. App. 1979). *But see* State *ex rel.* Clements v. Babb, 150 Ohio St. 359, 82 N.E.2d 737 (1948) (holding that the reasons for removal of a probationary employee cannot be merely frivolous conclusions).

209. Walton v. Montgomery County Welfare Dep't, 69 Ohio St. 2d 58, 430 N.E.2d 930 (1982). A discharged probationary employee, however, may have recourse under OHIO REV. CODE ANN. § 124.56 (Page 1984), which allows the state personnel board of review to investigate removal, reduction, suspension, layoff, or appointment if it has reason to believe that the appointing authority abused his discretion.

is legally removed, a vacancy exists which can be filled with a permanent replacement.

B. *Temporary Replacement of Striking Employees*

Although the civil service system, if applicable, would prohibit the permanent replacement of most civil service employees, temporary replacement for one month would not violate the civil service laws. Temporary appointments are expressly authorized in Ohio Revised Code Section 124.30(C): "Where the services to be rendered by an appointee are for a temporary period, not to exceed one month, and the need of such service is important and urgent, the appointing authority may select for such temporary service any person on the proper list of those eligible for permanent appointment."[210]

This statute does not mention the availability of a "position to be filled" or a "vacancy;" instead, it uses the term "services" and avoids the problem of invading the employment rights of the striker.[211] The temporary appointment is limited, however, to one month and successive temporary appointments to the position cannot be made.[212] Temporary replacements also may be permitted by the public employer's statutory ability to make emergency appointments. Section 124.30(A) states that "[i]n case of emergency, an appointment may be made without regard to the rules of Sections 124.01 to 124.64 of the Revised Code, but in no case to continue longer than thirty days, and in no case shall successive appointments be made."[213] The statute also allows for temporary appointments to cover periods of sickness or disability suffered by employees.[214]

In hiring temporary replacements, the public employer would have to use care in labeling such replacements. This labeling would be important in determining whether the temporary replacement would acquire any of the statutory civil service protections that would prevent her dismissal once the strike is terminated. There would be no dismissal problems with a temporary replacement hired under Section 124.30(A) and termed an emergency appointment. An emergency appointment is unclassified and enjoys none of the civil service protections.[215] A temporary replacement under Section 124.30(C) is hired for a specific period that cannot exceed thirty days.[216] The problem would arise if a public employer were to make provisional appointments to replace its striking workers.[217] A provisional appointment is made when an employer who is faced with an urgent need to fill a vacancy receives no certified list of eligible candidates because such a list does not exist.[218] A nominee

210. OHIO REV. CODE ANN. § 124.30(C) (Page 1984).

211. *See also* OHIO ADMIN. CODE § 123:1-21-02 (1982): "Where a position is vacant for a temporary period by reason of sickness or disability of a regular employee, and the Director is unable to certify from an eligible list for such temporary period, interim provisional appointments may be authorized for the period of sickness or disability."

212. OHIO REV. CODE ANN. § 124.30(C) (Page 1984).

213. *Id.* § 124.30(A).

214. *Id.*

215. OHIO ADMIN. CODE § 123:1-21-04 (1982).

216. OHIO REV. CODE ANN. § 124.30(C) (Page 1984).

217. *Id.* § 124.30(A).

218. *Id.*

may take a noncompetitive exam and be appointed provisionally to fill the vacancy until a competitive exam is conducted. A provisional employee enjoys the same rights as a certified employee and can be removed only for cause or by a certified appointment following a competitive exam for that position.[219] If a public employer were to use provisional appointments to replace strikers, both the provisional employee and the replaced striker may have valid claims to the same position once the strike has ended.

Besides using temporary appointments, a public employer also could transfer employees in order to continue providing services during a strike.[220] There are, however, substantial statutory restrictions on this alternative. The temporary transfer must be to a similar position; it can only last for thirty days; and only one temporary transfer can be made during a six-month period.[221] The employee's consent is not needed, however, for any transfer of thirty days or less.[222] The employee must comply with a transfer order while her appeal is pending with the State Personnel Board of Review.[223] Again, the public employer would have to exercise care in transferring employees during a strike because a transfer for more than thirty days becomes a permanent transfer.[224] Since only employees with vested rights can be transferred,[225] when the strike ends a public employer could again be faced with two employees making legally justified claims to the same position.

Under the civil service laws, a public employer could legally use temporary replacements for striking public employees. However, this practice would be restricted by the labeling of these temporary replacements and by the time constraints that the statute provides.

In sum, if the civil service laws apply to employer personnel moves during a lawful economic strike, the public employer's ability to maintain public services is severely circumscribed. First, only probationary employees can be permanently replaced. Second, temporary replacements can be retained for only thirty days. Third, nonbargaining unit employees can be transferred to perform struck work for only thirty days.

C. *Critique of the Application of Civil Service Laws to Striking Employees*

The civil service system may clash with the PECBL's collective bargaining regime. The Ohio General Assembly anticipated this confict and expressly dealt with it. Knowing it could not anticipate all such possible clashes, the legislature resolved them by providing for the collective bargaining regime to take priority over inconsistent civil service law provisions.

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219. A provisional employee holds her position under civil service protection until she is displaced by a regular appointee certified from an eligible list, she is removed for cause pursuant to statute, or her position is abolished. State *ex rel.* Dahmen v. City of Youngstown, 40 Ohio App. 2d 166, 318 N.E.2d 433 (Mahoning County Ct. App. 1973).

220. OHIO REV. CODE ANN. § 124.33 (Page 1984).

221. *Id.* §§ 124.32(A), .33.

222. OHIO ADMIN. CODE § 123:1–25–01(E) (1984 Supp.).

223. *Id.* § 123:1–24–01(M).

224. *Id.* § 123:1–25–01(G).

225. *Id.* § 123:1–25–01(A).

The issue is, therefore, the extent to which the PECBL supersedes civil service rules. Under the PECBL's supremacy clause,[226] civil service rules are superseded by any collective bargaining agreement that provides for final and binding arbitration.[227] Strikes are lawful, however, only when there is no agreement in existence,[228] and the PECBL declares that "[w]here no agreement exists . . . the public employer . . . [is] subject to all applicable state or local laws or ordinances pertaining to the . . . terms and conditions of employment for public employees."[229] Were this the only consideration, one could argue that because there is no contract in existence when public employees are lawfully on strike, employees are entitled to the full panoply of civil service protections, which includes the right of tenured employees to be free from permanent replacement while on strike.[230]

The analysis does not end there, however. The PECBL also contains a supremacy clause declaring that, with a few exceptions not relevant here,[231] it "prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in [the PECBL] . . . ."[232] There is nothing in the PECBL that specifies that civil service rules apply to the replacement rights of employers or the reinstatement rights of lawful strikers. Consequently, the question is whether the PECBL conflicts with the civil service laws. Because the PECBL is silent on replacement and reinstatement rights during economic strikes, there is no explicit conflict. Any conflict must be inferred by construing the PECBL to contain an implicit provision concerning striker replacement.

One can reasonably argue that the SERB and the courts should not read a conflict into the PECBL where no such conflict appears on the face of the statute. In view of the fact that the civil service laws would dictate approximately the same result that this Article reaches relying on public policy arguments,[233] it would be tempting to conclude that in the face of legislative silence the civil service laws should determine the parameters of replacement and reinstatement rights.

Although it is a close question, there are several reasons why civil service rules should not be dispositive. First, in granting the right to strike, the legislature did not distinguish between tenured and probationary employees; the rights of the two groups as strikers should be the same. If one group of strikers is subject to permanent replacement while another group within the same bargaining unit is not, the union representing the two groups is confronted with a perplexing dilemma. The union's constituents would not share a commonality of interest on a very important factor in deciding whether to strike, *i.e.*, the risks attendant to using that economic weapon. Probationary employees would be more willing to cross a picket line, thereby perhaps

226. OHIO REV. CODE ANN. § 4117.10(A) (Page Supp. 1984).

227. *Id.*

228. *See supra* text accompanying note 26.

229. OHIO REV. CODE ANN. § 4117.10(A) (Page Supp. 1984).

230. *See supra* notes 200–04 and accompanying text.

231. The PECBL has a special transit worker exception, which provides that state laws and arrangements relating to the acquisition of federal mass transit funds will take precedence to the extent necessary for the acquisition of such funds. OHIO REV. CODE ANN. § 4117.10(A) (Page Supp. 1984).

232. *Id.*

233. *See infra* Section VIII.

rendering the strike ineffective. Collective bargaining requires solidarity on the part of the employees; the civil service rules would undercut that solidarity.

Second, the PECBL instructs the SERB and the courts to construe it "liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees."[234] The legislature's message is that "the benefit of the doubt should be given to the remedial collective bargaining position."[235] Thus, the right to replace should be based upon the policy considerations underlying public sector collective bargaining, not upon the dictates of a prior statute which was intended to redress an entirely different problem.[236]

Third, the enactment of the lockout prohibition[237] suggests that the legislature did not contemplate that civil service laws would limit an employer's use of economic weapons during collective bargaining. Civil service protections make employer lockouts improper.[238] Consequently, the lockout prohibition is superfluous if employer personnel actions are constrained by civil service rules upon the expiration of a collective bargaining agreement.

Finally, the applicability of civil service requirements to personnel actions during a strike would severely limit the ability of a public employer to provide services to the community. Temporary replacements could be hired for only thirty days, and transfers of non-unit employees also would be limited to thirty days. There is no reason to believe that the Ohio General Assembly intended to place these restrictions on the public employer's ability to maintain public services.

By declaring that the PECBL "prevails over any and all other conflicting laws,"[239] the Ohio General Assembly expressed its intention not to have Ohio "public sector unionism and bargaining . . . superimposed on a well developed, explicit and, indeed, almost ossified alternate personnel system which went under the folkloric term, civil service."[240] Consequently, strikers' replacement and reinstatement rights should not be determined by the pre-existing civil service system.[241]

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234. OHIO REV. CODE ANN. § 4117.22 (Page Supp. 1984).

235. J. O'REILLY, *supra* note 10, at 255.

236. The Ohio civil service system was intended to promote merit-based personnel decisions by public employers. *See supra* note 196.

237. OHIO REV. CODE ANN. § 4117.11(A)(7) (Page Supp. 1984).

238. In effect, a lockout denies public employees who are willing to work the opportunity to do so. Civil service statutes prohibit employers from denying public employees the opportunity to work unless (1) there is just cause, *id.* § 124.34 (Page 1984), or (2) a lack of funds or a lack of work, *id.* § 124.321. A lockout situation does not come within the statutory definition of just cause. *Id.* § 124.34. The lack of funds or lack of work layoff provision would not generally be applicable when the employer's motive for denying its employees work is to bring pressure upon their union at the bargaining table. *Id.* § 124.321. Thus, if civil service laws are not preempted by the PECBL, then its anti-lockout provision would be unnecessary.

239. *Id.* § 4117.10(A) (Page Supp. 1984).

240. Weber, *Prospects for the Future*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 3, 5 (A. Knapp ed. 1977).

241. In State *ex rel.* Dispatch Printing Co. v. Wells, 18 Ohio St. 3d 382, 384, 481 N.E.2d 632, 634 (1985), the Ohio Supreme Court concluded that section 4117.10(A) "was designed to free public employees from conflicting laws which may act to interfere with the newly established right to collectively bargain." A statutory scheme that would permit some members of the bargaining unit to be subject to permanent replacement in the event of a lawful strike while insulating others from permanent replacement has the potential for interfering with the right to collectively bargain. Furthermore, the Ohio Supreme Court has declared that "statutes [are to] be construed to avoid unreasonable or absurd consequences." *Id.* Permitting some strikers to be permanently replaced while protecting fellow strikers from such action would certainly lead to an absurd consequence. The better view would be to construe the PECBL to avoid such an anomalous result. The civil service laws ought not be burdened with a load they were not meant to carry.

Assuming that civil service rules do not limit a public employer's response to an economic strike in Ohio, it must next be determined whether the due process clauses in the federal or state constitutions restrict employers.

VI. The Constitutional Due Process Rights of Public Employees

A. *The Ohio Constitution*

Ohio civil service employees enjoy a cognizable interest in continuing employment, which can be abrogated only in accordance with the strictures of due process.[242] The Ohio Constitution provides that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law . . . ."[243] This provision has been construed to contain the same limitations as the due process clause of the fourteenth amendment to the United States Constitution.[244] Consequently, the constitutionality of replacing lawfully striking public employees in Ohio may be determined solely with reference to the federal constitution.

B. *The United States Constitution*

Because any action taken by a public employer with regard to the employment status of a public employee constitutes state action, such action is circumscribed by the requirements of the federal constitution.[245] Consequently, the constitutional limitations on the freedom of a public employer to discharge public employees[246]

On the other hand, even if the civil service system does not determine replacement and reinstatement rights, its role is nonetheless important. There seems to be little reason why public employers should not be bound by civil service requirements in selecting and appointing replacements. The PECBL expressly asserts the primacy of the civil service system in the selection and appointment of employees. Ohio Rev. Code Ann. § 4117.08(B) (Page Supp. 1984). Similarly, it would seem that civil service laws must be followed in selecting and appointing replacements. Other than prohibiting the employment of unqualified public servants, this should impose little restriction on employers' ability to respond to strikes while assuring that the basic thrust of the civil service laws is observed.

242. Jackson v. Kurtz, 65 Ohio App. 2d 152, 157–58, 416 N.E.2d 1064, 1068 (Hamilton County Ct. App. 1979); *see also* Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 559 (6th Cir. 1983), *aff'd*, 105 S. Ct. 1487 (1985).

243. Ohio Const., art. I, § 16.

244. *In re* Appropriation for Highway Purposes, Barnhardt v. Linzell, 104 Ohio App. 243, 243, 148 N.E.2d 242, 244 (Lorain County Ct. App. 1957) ("the phrase 'due course of law' as used in Section 16, Article I of the Constitution of Ohio is equivalent in meaning to the phrase 'due process of law' as employed in the Fourteenth Amendment to the United States Constitution"); Wilson v. City of Zanesville, 130 Ohio St. 286, 289, 199 N.E. 187, 189 (1935) ("the words 'due course of law' are equivalent in meaning to 'due process of law'"). *See also* State v. French, 71 Ohio St. 186, 201, 73 N.E. 216, 217 (1905); Salt Creek Valley Turnpike Co. v. Parks, 50 Ohio St. 568, 579, 35 N.E. 304, 306 (1893). *But see* Beatrice Foods Co. v. Lindley, 70 Ohio St. 2d 29, 36, 434 N.E.2d 727, 732 (1982) (construing Ohio's due course of law clause as not requiring a hearing prior to a taking because the "for an injury done him" language contemplates a hearing only after the taking of property); Parfitt v. Columbus Correctional Facility, 62 Ohio St. 2d 434, 438, 406 N.E.2d 528, 531 (1980) ("There is no requirement, either direct or inferred, to grant a right to pre-termination hearings . . . under the Ohio constitution's due course of law guarantee.").

245. Specifically, such action may not constitute a deprivation of liberty or property without due process or equal protection of the laws in violation of the fifth or fourteenth amendments. U.S. Const. amend. V, amend. XIV, § 1. The issue, then, in the discharge of a public employee generally will be whether she had a property interest within the meaning of the fifth and fourteenth amendments so as to fall under their protection. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972). Additionally, the issue may be whether the discharge was under circumstances that constitute a deprivation of liberty within the meaning of those amendments and thus come under their protection. *See id.* at 572–74; *cf.* Bishop v. Wood, 426 U.S. 341 (1976) (policeman's discharge for failing to perform adequately did not constitute deprivation of liberty interest); Paul v. Davis, 424 U.S. 693 (1976) (inaccurate listing of petitioner on active shoplifters list did not infringe upon liberty interest protected by fourteenth amendment).

246. Historically, employment by the government was deemed a privilege rather than a right; therefore, the public

must be examined to determine whether the replacement of economic strikers by public employers is subject to the constraints of the federal constitution.

Constitutional challenges to employment decisions made by a public employer usually are based upon the due process provisions of the Constitution.[247] Since 1972, the Supreme Court has evaluated all procedural due process claims within the two-step framework set forth in *Board of Regents v. Roth*[248] and *Perry v. Sindermann*.[249] First, to merit due process protection, the employee must possess a property or liberty interest in her job which has been threatened or deprived by the governmental employment decision. Second, if she enjoys such an interest, the employee is entitled to a pre- or post-deprivation hearing whose requirements are to be determined on a case-by-case basis.

Under the two-step *Roth* analysis, an employee facing replacement or discharge is entitled to the safeguards of procedural due process only if she can demonstrate that the public employer's action implicates a property or liberty interest protected by the due process clause. If the employee fails to meet this threshold requirement, she must settle for whatever procedures are provided by statute or regulation.[250]

Thus, it is essential to determine what constitutes a protectable property interest in public employment. *Roth* is the seminal case in this area. In *Roth*, a nontenured state university professor was notified that he would not be rehired.[251] Under state law, Roth had no tenure or other rights at the expiration of his contract.[252] Roth sued the university in federal district court alleging that the university had violated his fourteenth amendment rights.[253]

In defining the characteristics of a property interest, the Court observed: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[254] In determining whether such a "legitimate claim of entitlement" existed, the Court noted that "[p]roperty

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employee had no entitlement to constitutional protections. *See, e.g., Ex parte* Hennen, 38 U.S. (13 Pet.) 225 (1839), in which the Supreme Court held that the Constitution did not intend for inferior offices to be held for life and "it would [therefore] seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." *Id.* at 259. For a detailed discussion of the "right-privilege" doctrine, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *See also* Connick v. Myers, 461 U.S. 138, 143–44 (1983) (tracing the doctrine's history); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 528–30 (2d ed. 1983) (tracing the distinction's collapse and citing sources).

247. U.S. CONST. amend. V, amend. XIV, § 1. The fifth amendment provides in part: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ." *Id.* amend. V. The fourteenth amendment in part states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* amend. XIV, § 1.

248. 408 U.S. 564 (1972).

249. 408 U.S. 593 (1972).

250. *See* Board of Regents v. Roth, 408 U.S. 564, 569–71 & n.8 (1972).

251. *Id.* at 566. David Roth had been hired by the university for only a fixed one-year term. *Id.*

252. *Id.* at 566–67. In fact, the only requirement was that the university inform Roth by February 1 of their intention not to rehire him. *Id.* at 567. The president of the school so notified Mr. Roth, giving no reason for the decision. *Id.* at 568.

253. *Id.* at 568. The district court granted Roth's motion for partial summary judgment and ordered the university to grant Roth a hearing and furnish him with reasons for their decision not to rehire him. *Id.* at 569. The court of appeals affirmed, and the university appealed to the Supreme Court. *Id.*

254. *Id.* at 577.

interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[255]

Applying this definition of property interests to Roth's teaching post, the Court held that the university's summary refusal to renew Roth's contract failed to implicate any property interest because state law placed these dismissals in the "unfettered discretion of university officials."[256]

The facts in *Sindermann* differed from those in *Roth* only in that Sindermann alleged that, despite the absence of any renewal guarantees in his contract, a de facto tenure program had been established by the college's faculty guidebook.[257] While affirming that *Roth's* definition of property interests was not "limited by a few rigid, technical forms,"[258] the Court held that, if Sindermann could prove upon remand that the guidebook created an entitlement to contined employment, he would have an interest protected by the due process clause.[259] The Court cautioned, however, that the legitimacy of Sindermann's expectations turned on state law: "If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, [his property] claim would be defeated."[260] Thus, state law determines the existence and defines the contours of the employee's interest and the due process clause protects only interests that rise to the level of property.

In *Arnett v. Kennedy*,[261] a federal employee protected from dismissal except for cause, challenged the constitutional sufficiency of the panoply of statutory procedural protections available to him. Rejecting the plaintiff's claim, the three-Justice plurality[262] reasoned that, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, [an employee] . . . must take the bitter with the sweet."[263] In incorporating procedure into the definition of the property interest, the plurality opinion in essence collapsed the two steps of the *Roth* test into one. The remaining six Justices, however, refused to restructure the *Roth* test. Although they agreed that the federal statute was the source of the plaintiff's property interest, all six were unwilling to incorporate the statutory limits on procedure into the property interest itself. In their view, the procedures attendant to the deprivation of an employee's property interest could not be insulated from independent judicial scrutiny.[264] The government employer prevailed, however, because Justices Powell and Blackmun found that the statutory

255. *Id.*

256. *Id.* at 567.

257. Perry v. Sindermann, 408 U.S. 593, 600 (1972).

258. *Id.* at 601.

259. *Id.* at 599–603.

260. *Id.* at 602 n.7; *see also id.* at 603 (Burger, C.J., concurring) (emphasizing that the employment relationship "is essentially a matter of . . . state law").

261. 416 U.S. 134 (1974) (plurality opinion).

262. Justice Rehnquist announced the Court's judgment in a plurality opinion joined by Chief Justice Burger and Justice Stewart. *See id.* at 136.

263. *Id.* at 153–54.

264. *See id.* at 166–67 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part); *id.* at 177 (White, J., dissenting); *id.* at 211 (Marshall, J., joined by Brennan, J. and Douglas, J., dissenting).

procedures adequately protected the plaintiff's property interest and thus satisfied the second step of the due process test.[265]

In *Bishop v. Wood*,[266] the Court emphasized the crucial role of state law in due process analysis.[267] Bishop, a North Carolina policeman who had been summarily discharged, asserted a property interest arising from a city ordinance that classified him as a permanent employee. The North Carolina Supreme Court had ruled in an earlier case that, under North Carolina law, "an enforceable expectation of continued public employment [could] exist only if the employer, by statute or contract, has actually granted some form of guarantee."[268] Although admitting that the ordinance could "fairly be read as conferring . . . a guarantee" of continued employment absent cause for dismissal,[269] the Court deferred to the lower federal courts' conclusion that the ordinance provided employment only on an at-will basis. Because Bishop's interest in his job did not rise to the level of a property right, the city was free to provide, or not provide, whatever discharge procedures it desired.

Even if an employee in the public sector has no property interest in her employment, she is entitled to a due process notice and hearing when the discharge constitutes a denial of a liberty interest cognizable under the fifth and fourteenth amendments. The Supreme Court first recognized that an employee may have a liberty interest in her job in *Meyer v. Nebraska*.[270] The Court held that liberty denotes "the rights of an individual . . . to engage in any of the common occupations of life."[271]

In *Roth*, however, the Court established that only two liberty concerns potentially implicated in the discharge of a public employee can trigger administrative hearing rights: (1) an employee's interest in her good standing in the community and (2) her interest in pursuing a career elsewhere.[272] In rejecting Roth's liberty claim, the Court restrictively characterized the liberty interests in reputation and employment opportunity. First, the Court held that the university had not implicated Roth's liberty interest in reputation because, in declining to rehire Roth, it had not directed any charges against him that could "seriously damage his standing and associations in his community."[273] Likewise, the Court narrowly construed Roth's interest in pursuing a career elsewhere by holding that simple nonretention did not deprive Roth of liberty, but merely rendered him "somewhat less attractive" to future employers.[274] To rise to the level of a deprivation of liberty, the foreclosure of other employment opportunities must be more severe, such as regulations barring an employee from future employment in a particular jurisdiction.[275]

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265. *See id.* at 167–71 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part).
266. 426 U.S. 341 (1976).
267. *See id.* at 344 & n.7.
268. *Id.* at 345 (*citing* Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971)).
269. *Id.*
270. 262 U.S. 390 (1923).
271. *Id.* at 399.
272. Board of Regents v. Roth, 408 U.S. 564, 573–74 (1972).
273. *Id.* at 573.
274. *Id.* at 574 n.13.
275. *See id.* at 573–74.

Since *Roth*, the Court has restricted further its definition of liberty interests. To establish such an interest, a public employee now must (1) show that she was stigmatized in connection with an alteration of her legal status as an employee,[276] (2) allege that the stigma arose from substantially false characterizations of the employee or her conduct,[277] and (3) demonstrate that the damaging characterizations were made public through channels other than the litigation initiated by the employee.[278]

Once an employee has established a property or liberty interest, the second step of the *Roth* analysis entitles her to "some kind of hearing."[279] The Court has formulated a balancing test for determining the procedures required once due process rights arise.[280] This test mandates consideration of three factors: (1) the weight of the employee's interest at stake, (2) the value of additional procedural safeguards in enhancing administrative accuracy, and (3) the government's interest in avoiding cumbersome proceedings.[281] The second step of the *Roth* test thus attempts to strike a balance that ensures procedural fairness to public employees without handcuffing governmental personnel directors.[282]

In *Arnett v. Kennedy*,[283] the Court indicated that the courts were to approach employees' procedural due process claims with deference to agency prerogative. In his decisive concurring opinion, Justice Powell found that the array of procedures afforded the employee satisfied the demands of due process. He reasoned that the government's interest in "the maintenance of employee efficiency and discipline" outweighed any interest the employee may have had in enhanced protections.[284] Thus, *Arnett* suggests that public employers ordinarily will be able to limit their employees' property interests to the particular procedural protections the employers choose to provide.[285]

However, in *Cleveland Board of Education v. Loudermill*,[286] the Court's latest word on property interests in public employment, Justice White emphasized that although an entitlement may arise from state law, how much process is due is determined by the due process clause, not state law.[287] Loudermill, a classified civil service employee, was dismissed when his employer discovered that he had been convicted of a felony, contrary to an assertion he had made on his job application.[288]

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276. *See* Paul v. Davis, 424 U.S. 693, 708–12 (1976) (holding that a government action defaming an individual implicates a liberty interest only when the action is accompanied by an alteration of the individual's legal status).

277. *See* Codd v. Velger, 429 U.S. 624, 627 (1977) (per curiam) (ruling that an employee enjoys a right to an administrative hearing only when an agency has proceeded against him on the basis of what he contends are substantially false allegations).

278. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976) (holding that public employees' liberty interests are infringed only when the asserted grounds for personnel actions are publicly disclosed).

279. Board of Regents v. Roth, 408 U.S. 564, 570 & n.8 (1972).

280. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

281. *Id.*

282. *See* Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741, 745–46 (1976).

283. 416 U.S. 134 (1974).

284. *See id.* at 168–71 (Powell, J., concurring in part and concurring in the result in part); *see* Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 163–65 (1983).

285. *See* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 464 (1977).

286. 105 S. Ct. 1487 (1985).

287. *Id.* at 1491–93.

288. *Id.* at 1489–90.

Ohio law permitted dismissal only for cause and granted a right of post-termination administrative review.[289] He claimed that the due process clause requires an opportunity to respond to charges prior to dismissal even though Ohio law did not provide for such an opportunity.[290]

In an opinion joined by eight Justices, the Court held that, although Loudermill's property right was created by the Ohio statute, the limits on its protection must pass federal scrutiny. "Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty."[291] According to the Court, "a full adversarial evidentiary hearing prior to [termination]" need not be afforded where a full post-termination hearing is provided.[292] Under the due process clause, however, Loudermill was entitled to "oral or written notice of the charges . . . , an explanation of the employer's evidence, and an opportunity" to respond prior to termination.[293]

The *Roth* two-step framework should not preclude the replacement of lawful economic strikers in response to a public employee strike. The *Roth* analysis first requires that the replaced striker have a property interest in her job.[294] State law determines the existence and defines the contours of an employee's property interest.[295] Because Ohio neither recognizes implied contracts as a source of tenure for public employees nor entertains promissory estoppel actions by public employees,[296] public employees in Ohio have "an enforceable expectation of continued public employment . . . only if the employer, by statute or contract, has actually granted some form of guarantee."[297] Thus, employees such as teachers who have contracts guaranteeing continued employment or employees with tenure under civil service statutes guaranteeing continued employment absent cause for dismissal have a stake in their jobs that amounts to a property interest. Employees who have no guarantee of continued employment are at-will employees whose stake in their jobs falls short of being a property interest.

Because permanent replacements of tenured employees threatens a protected property interest, it is necessary to determine the procedural due process to which a lawfully striking employee is entitled before she can be permanently replaced. An employee's property interest does not preclude an employer from taking an adverse

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289. *Id.* at 1490.

290. *Id.*

291. *Id.* at 1493.

292. *Id.* at 1495.

293. *Id.*

294. It is unlikely that any liberty concern is potentially implicated by the replacement of a striking public employee. First, replacement while striking would not appear to implicate the employee's liberty interest in reputation because such governmental action would not direct any charges against the employee that could "seriously damage his standing and associations in his community." Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Second, replacement while striking would not implicate an employee's interest in being able to pursue a career elsewhere since private employers are prohibited from discriminating against employees because of their prior union activity, 29 U.S.C. § 158(a)(3) (1982), as are public employers in Ohio. OHIO REV. CODE ANN. §§ 4117.11(A)(1), (3), (4) (Page Supp. 1984).

295. *See supra* text accompanying note 260.

296. "A public employee holds his position as a matter of law and not of contract." Jackson v. Kurtz, 65 Ohio App. 2d 152, 154, 416 N.E.2d 1064, 1066 (Hamilton County Ct. App. 1979). *See also*, Fuldauer v. City of Cleveland, 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972); State *ex rel.* Gordon v. Barthalow, 150 Ohio St. 499, 83 N.E.2d 393 (1948); Anderson v. Minter, 32 Ohio St. 2d 207, 291 N.E.2d 457 (1972).

297. Bishop v. Wood, 426 U.S. 341, 345 (1976).

personnel action, such as permanent replacement, against that employee. Instead, the procedures provided to the employee must meet the requirements of the due process clause. "'The fundamental requisite of due process of law is the opportunity to be heard' . . . 'at a meaningful time and in a meaningful manner.'"[298] Consequently, it would appear that the due process requirements would be satisfied if the employer notifies the striking employees prior to hiring permanent replacements that the strikers must make an unconditional offer to return to work by a certain date, or else seek to be heard on their claim that they are not engaging in a strike. Offering a pre-replacement notice and an opportunity to be heard should meet the constitutional guidelines set forth in *Loudermill*.[299]

Thus, under *Roth* and its progeny, the due process clause should not prevent the permanent replacement of tenured public employees. Consequently, the right of public employers to permanently replace strikers is a statutory question rather than a constitutional one.

VII. The Right of Public Employers in Other States to Replace Lawful Strikers

In the eleven states other than Ohio where certain public employees may engage in lawful strikes,[300] no reported decision has expressly confronted and decided the issue of the replacement of lawful strikers. Several decisions, however, have assumed, sub silentio, that public employers possess such a right.

In *Board of Trustees v. State*,[301] the Montana Supreme Court did not question the employer's assertion that it had a right to permanently replace school teachers engaged in a lawful economic strike. The school district mailed a letter to each of its striking teachers stating that the teacher would be replaced unless he or she returned to work by October 15, 1975.[302] Citing private sector cases construing the NLRA, the school district contended that the "letters simply informed its striking teachers of what the District had a legal right to do, namely to replace teachers who refused to return to work after October 15, 1975."[303] Even though the Montana Collective Bargaining Act[304] does not address the right of public employers to replace lawful economic strikers, the Montana Supreme Court did not question the employer's claim that it had a legal right "to permanently replace nonreturning workers after a specified date."[305] Instead, the court ruled that the letter sent to the teachers with a deadline for returning to work was an unfair labor practice because "[t]he District's failure to hire replacement teachers after the deadline passed suggests that the District's primary

298. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (*quoting* Grannis v. Ordean, 234 U.S. 385, 394 (1914), and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). *See also* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1495 (1985) (concluding that a pretermination notice and opportunity to respond is a "fundamental due process requirement").

299. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1495 (1985).

300. *See supra* note 13.

301. 604 P.2d 778 (Mont. 1979).

302. *Id.* at 779.

303. *Id.* at 781.

304. Mont. Code Ann. §§ 39-31-101 to -409 (1983).

305. Bd. of Trustees v. State, 604 P.2d 778, 781 (Mont. 1979).

motivation was to halt the strike rather than to keep its schools open."[306] Thus, if the school district had in fact replaced its striking teachers, it apparently would not have committed an unfair labor practice. The court assumed that replacing lawful strikers to keep schools open is permissible.

Similarly, in *Local 1494, International Association of Firefighters v. City of Coeur d'Alene*,[307] the Idaho Supreme Court clearly indicated in dictum that it believed that, in the face of legislative silence, public employers have the right to replace lawful economic strikers. The city's firefighters engaged in a strike after an impasse in negotiations, and the city discharged them. The court held that the strike was not illegal and that the discharges were unlawful because the city had bargained in bad faith.[308] In effect, the court ruled that the firefighters were engaged in an unfair labor practice strike,[309] and thus could not be discharged. The court, however, did not confine its discussion to the legality of discharging public employees engaged in a lawful strike provoked by the employer's bad faith bargaining. Instead, the court indicated that if the employer had not engaged in bad faith bargaining, and if the employees had struck lawfully to support their bargaining demands (*i.e.*, an economic strike), then the employer would have had "cause" to discharge them within the meaning of the civil service laws if they had not reported to work when ordered to do so.[310] Consequently, according to this dictum, the firefighters' right to strike does not include a right not to be discharged in the event a strike occurs. Thus, although the court speaks in terms of "discharge" rather than "replacement," Idaho law appears to track private sector law: unfair labor practice strikers cannot be replaced or discharged while economic strikers receive less protection—possible permanent replacement in the private sector and possible discharge in Idaho.

The Michigan Supreme Court has also assumed, without analysis or discussion, that public employers have the same right to replace strikers as their private sector counterparts. In *Rockwell v. Crestwood School District Board of Education*,[311] the Michigan Supreme Court observed:

> When public employees strike, the public employer must, like a private employer, be able to hire substitute employees so that the public business is not interrupted. In order to hire competent replacements, it may be necessary for the public employer to offer permanent

306. *Id.*

307. 99 Idaho 630, 586 P.2d 1346 (1978).

308. "[T]he City . . . did not act in good faith in the bargaining process, but pursued a hard line approach to the problem, the effect of which drove the Firefighters to the wall and into a strike . . . ." *Id.* at 643, 586 P.2d at 1359 (quoting the lower court's opinion).

309. Idaho does not have a comprehensive public sector collective bargaining statute that sets forth what constitutes an employer unfair labor practice. The employer's course of conduct in this case—including unilateral withdrawal of benefits, bad faith bargaining, and a refusal to bargain—would be an unfair labor practice in most jurisdictions. *See, e.g.*, OHIO REV. CODE ANN. § 4117.11(A)(5) (Page Supp. 1984); 29 U.S.C. § 158(a)(5) (1982).

310. "We likewise reject the extreme viewpoint at the opposite end of the spectrum, namely, that the firefighters were . . . insulated from discharge if they chose to exercise their right to strike." Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 643, 586 P.2d 1346, 1359 (1978). According to the court, in the absence of protective contractual language or bad faith employer bargaining, the employees' refusal to return to work during a lawful strike when ordered to do so gives the city "cause" for discharge under the state's civil service laws. *Id.* at 643, 586 P.2d at 1359. *See* IDAHO CODE § 50-1609 (1980).

311. 393 Mich. 616, 227 N.W.2d 736 (1975).

> employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time-consuming adjudicatory processes.[312]

This statement concerning strike replacements was made in the context of deciding that the due process clause did not require a hearing before the strikers were replaced. The implicit assumption, again, was that public employers have the right to permanently replace strikers.[313]

Although three jurisdictions have assumed that public employers should have the right to replace striking public employees, no reasons have been advanced for this result other than automatic deference to private sector decisions.

VIII. As a Matter of Public Policy, What Right Should Public Employers Have to Replace Lawful Economic Strikers?

As we have seen, no definitive answer exists to the question whether public employees in Ohio may legally replace workers engaged in a lawful economic strike. No compelling reasons exist for either rejecting outright private sector precedents or importing them wholesale into the Ohio public sector. The legislative history and the statutory scheme itself provide no guidance. Because of the PECBL's supremacy clause, the Ohio civil service laws should not determine employers' striker replacement rights. Neither the Ohio nor the federal constitution precludes the replacement of striking public employees. Furthermore, no other jurisdiction has presented persuasive arguments for determining what the extent of the public employer's right to replace lawfully striking workers should be. Consequently, the SERB and the courts will have to base their determination of this issue primarily upon their view of the competing public policy considerations. This section reviews the possible options and concludes that—as a matter of public policy—Ohio public employers should have the right to continue operating during a lawful strike with temporary workers, but Ohio public employers should not have the right to hire permanent replacements for lawful economic strikers.

To begin the analysis of public policy arguments, assume that a union calls a strike of Ohio public employees. The union has surmounted all the procedural hurdles to obtain its legal right to strike and is prepared to exercise this weapon to resolve a negotiating impasse with the employer. When the employees go out on strike, what may the employer do? May it attempt to continue operating? May it replace the strikers with newly hired employees? May it permanently imperil the strikers' jobs?

A starting point in determining the position the SERB and the courts should take in the absence of legislative guidance is to consider one polar extreme—the laissez-faire position. By this view the SERB should do absolutely nothing. The essence of collective bargaining is an economic struggle. Strike action is the union's chief weapon; the union attempts to deny the employer its supply of labor until the latter is willing to improve its contract offer. But the employer is perfectly entitled to resist

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312. *Id.* at 634–35, 227 N.W.2d at 744.

313. It must be noted, however, that Michigan law prohibits public employee strikes. Mich. Comp. Laws § 423.206 (1984).

that effort; its major instrument is its right to control the means of operation. If the employer can find enough workers who are willing to work for the offer which has been rejected by the union, then it should be entitled to keep operating. Only in this way will corresponding pressure be placed upon the strikers to moderate their demands. In essence, this was the common law position[314] and is the position largely prevalent in British labor law today.[315]

The laissez-faire position should be rejected by the SERB. Doing nothing is totally inconsistent with the legislative scheme for regulating public sector strikes in Ohio. The Ohio General Assembly has rejected the no-holds-barred, anything-goes economic warfare model.[316] The PECBL narrowly circumscribes who can strike, when they can strike, and what weapons they can use.[317] Furthermore, even private sector labor law definitely has moved beyond the laissez-faire point in at least one respect: It guarantees the economic striker her employee status, although not necessarily her job.[318]

The line drawn under the NLRA between discharge (which is prohibited) and permanent replacement (which is permitted) has troubled many observers as a legal distinction without a factual difference which can and does work a gross injustice.[319] There are compelling reasons why this distinction should not be superimposed on the regulatory scheme devised under the PECBL. Employees engaged in a lawful strike are exercising the right of collective action protected by the statute.[320] They have followed the entire battery of complex legal restrictions for exercising this right. They should not risk loss of their jobs and benefits such as vacation, accumulated sick pay, and pension rights earned through years of service. Some may be too old to find comparable jobs without uprooting their families and leaving their local communities. The sight of replacements going through picket lines creating this threat to the working career of regular employees often incites the violence that occasionally mars our system of labor relations.[321] The law should seek to avoid such unfortunate events, especially in public sector labor relations.

The *Mackay* rule permits an employer to destroy, perhaps permanently, a striker's right to her job by hiring a replacement. The practical operation of the *Mackay* rule is indefensible and impossible to square with the purpose of the PECBL. First, the right to hire replacements is more beneficial to an employer when the union is relatively weak.[322] Thus, such a rule exacerbates disparities in bargaining power rather than establishing equality of bargaining power between the parties. Second, the

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314. *See* Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).

315. *See* Wedderburn, *The New Structure of Labour Law in Britain*, 13 ISRAEL L. REV. 435, 449–50 (1978) (noting that British labor law is "non-interventionist" and that British employers are free to dismiss all employees who have gone on strike).

316. *See supra* notes 145–73 and accompanying text.

317. *See supra* Section II.

318. *See supra* text accompanying notes 51–68.

319. *See supra* notes 80–105 and accompanying text.

320. OHIO REV. CODE ANN. § 4117.14(D)(2) (Page Supp. 1984).

321. *See, e.g.*, Comment, *supra* note 190, at 202–03; Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459, 460 (1966).

322. *See* Weiler, *supra* note 80, at 394; *see also supra* note 103.

Mackay rule endangers peaceful prosecution of the strike.[323] Third, the rule may be used to eliminate collective bargaining altogether.[324]

Therefore, the SERB should provide guarantees to legal strikers that they can return to their jobs if and when they wish to end their strike. The employer remains free to operate and supply services to the community and is free to hire replacements in order to do so. The assumption is that the employer can and should attract replacements without promising them permanent preference over strikers.[325] An employer cannot guarantee permanent preference in any event; if the union has the strength to win an acceptable settlement, that settlement almost invariably gives return-to-work privileges to the strikers, and often will require discharge of their replacements.[326] In those cases where the union does not have the power to do this on its own, where the strike has been a miscalculation of relative economic and political power, the SERB should hold that it is the strike replacements, not the legal strikers, who risk the loss of their jobs if the end of the strike results in more employees than available jobs.[327]

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323. Gillespie, *supra* note 80, at 787 (footnote omitted) ("Since the permanent replacement doctrine raises the stakes for both employees and the union, it exacerbates the strife between labor and management. The threat of violence accompanying the use of permanent replacements at least partly explains state strikebreaker statutes that attempt to limit the use of replacements.") (footnote omitted). *See also* authorities cited in note 321 *supra*.

324. Schatzki, *supra* note 51, at 383 (The *Mackay* doctrine "is an invitation to the employer, if he is able, to rid himself of union adherents and the union."). *See also supra* note 96; *infra* note 327.

325. Schatzki, *supra* note 51, at 391–92; *see also* Gillespie, *supra* note 80.

326. Weiler, *supra* note 80, at 392.

327. The ouster of strike replacements at the conclusion of the strike should pose no constitutional problems because they would have no "enforceable expectation of continued public employment," Bishop v. Wood, 426 U.S. 341, 345 (1976), if their employer is not permitted to grant them permanent employment. *See supra* text accompanying notes 266–69.

Another argument for prohibiting the permanent replacement of lawful strikers can be based on an analysis of the reasons for operating during a strike. The employer's decision to continue operations during a lawful strike may be motivated by either defensive or offensive considerations. If defensive considerations are the basis for the decision to operate, then the employer's goal is to take a strike so that it can continue providing services for its constituents. On the other hand, if offensive considerations are the basis for the decision to operate, then the employer's goal is to break the strike and the union. These two motivations are not discrete categories. They are instead two points on a continuum. In the middle of these two polar motivations, of course, is the obvious fact that operating during a strike can weaken a union and increase management's bargaining power, regardless of whether the employer's motivation is offensive or defensive. For an excellent discussion of the considerations involved in operating during a strike in the private sector see C. PERRY, A. KRAMER & T. SCHNEIDER, OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS (1982).

Because the Ohio General Assembly's purpose in enacting the PECBL was to "promot[e] orderly and constructive relationships between all public employers and their employees," OHIO REV. CODE ANN. § 4117.22 (Page Supp. 1984), continuing operations during a lawful strike should be a defensive weapon for public employers designed to serve the narrow economic and political purpose of maintaining services, not an offensive weapon to break the union. Any employer operating simply to cut its strike losses and to maintain services should do so in a manner that would not threaten the jobs of striking workers or the status of the striking union. Under the PECBL, the public employer should have neither the intention nor the desire to replace the strikers permanently. If management's objective is to offset union bargaining power and to provide services for its constituents rather than to break the union, then management should be content with using temporary employees, supervisors, and other nonbargaining-unit employees, not permanent new hires. *See generally* C. PERRY, A. KRAMER & T. SCHNEIDER, *supra*.

Should the SERB go the next step?[328] Should it decide that when the employees have legally gone on strike, the employer cannot replace them with temporary workers in order to keep operating and supplying services to the public? Such a legal rule would imply a quite different conception of the legitimate calculation of economic and political pressures in a public sector strike. During the strike, the employees are without regular paychecks. This loss of income presumably places economic pressures on the employees and on their union to compromise. Under the view that public employers may not use temporary replacements, the employer would face an analogous political pressure because its operation would be shut down and it would have stopped supplying services to its constituents. But if the employer is able to use replacements to continue supplying services, then the absence of serious political pressures on the employer to settle can produce a long and bitter strike, violence on the picket line, confrontation with the police, and possibly the breaking of the union.[329]

Although there is some force to these arguments for prohibiting the employer from using temporary replacements, they are not persuasive. For example, consider the case of a small unit in an employer's operation. The unit employees may perform work that is integral to the entire operation. If they go on strike to win their demands by shutting down the employer, should the supervisors be able to bar the employer from replacing the striking employees, even when the other unions disapprove of the strikers' objectives and would cross the picket lines to supply services to the public? The SERB should not give that much power to a single union.

Second, such a legal rule addresses only one side of the political-economic equation during a strike. It prohibits the employer from supplying services to its constituents during a strike, but it does not prohibit the employees from working elsewhere while on strike. Both for reasons of principle and of administrative feasibility, the right of workers to seek work elsewhere should not be restricted. By the same token, however, the SERB should not prohibit employers from hiring temporary replacements who are willing to work at rates and conditions which they consider acceptable and the employer believes are economically feasible.

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328. Because public employers should feel constrained to avoid violence and to maintain a working spirit between labor and management, see OHIO REV. CODE ANN. § 4117.22 (Page Supp. 1984), it could be argued that public employers should not be permitted to continue operations during a strike regardless of the strike's motivation. *See supra* note 327. The decision to operate during a strike, if implemented successfully, threatens to undermine the union's basic power asset in collective bargaining—the strike. Because unions and unionized workers are unlikely to be sanguine about such a threat, management must expect that the union and its members will use a wide range of tactics—including, perhaps, violence—to make successful continuing operations as difficult as possible.

Furthermore, the fundamental effect, even if it is not the purpose, of operating during a strike is to alter the balance of power in collective bargaining in management's favor by limiting economic and political losses resulting from a strike. In the short run, this enhanced bargaining power should enable management to secure a more favorable settlement than would have been the case in the event of nonoperation. In the long run, this enhanced bargaining power should result in a series of more modest settlements, possibly to the point of seriously weakening the perceived effectiveness of a union in representing employees. Such management "victories," however, are not likely to be won easily. They may have to be won at the price of increased tension, if not bitterness, in both employee and union relations, both immediately after a strike and over the long run as workers and unions vent whatever frustration they experience as a result of management's enhanced bargaining power. Consequently, a strong argument exists that Ohio public employers should not be permitted to continue operations at all in the event of a lawful strike because of the likely effect of operating during a strike on the "relationships between all public employers and their employees." OHIO REV. CODE ANN. § 4117.22 (Page Supp. 1984).

329. *See supra* note 327.

Finally, and in some instances most importantly, such a legal rule would provide the public employer with no means of providing services that are essential to the public's safety or health,[330] after the statutory 63-day injunction.[331]

Thus, prohibiting a public employer from replacing employees legally on strike is too harsh.[332] On the spectrum of possible restraints on employer responses to a legal strike, the SERB should limit the employer to temporary replacements.

The scope of replacement rights of public employers and the reinstatement rights of public employees must be defined in a way that best accommodates the essential interests of government employers and employees, as well as those of the public. The approach proposed here for defining replacement rights—permitting the employer to continue operating with temporary replacements, but prohibiting permanent replacements—attempts to harmonize the government employer's dual role as public manager and public services provider. When the employer is also the government, one must reconcile not only the conflicting interests that typically spark disagreement between any employer and its employees, but also must take into account the particular responsibilities of government as the entity entrusted with carrying out public policy on behalf of all the people. As this Article has argued, the public employer's right to replace should be defined in a way that will foster collective bargaining, by protecting striking employees not only against outright discharge, but also against forfeiture of their jobs to permanent replacements. On the other hand, the government's dual identity as both employer and governor must be accommodated by permitting the public employer to continue providing services to the public during a legal strike through the use of temporary replacements.

IX. CONCLUSION

The development of the law of public employment in Ohio should be guided by three separate but interrelated considerations. First, Ohio's public employment law should reflect the differences between public and private sector employment. The civil service system is an explicit acknowledgment that public employees should be afforded different treatment than their private sector counterparts. The tenure system protecting civil servants against dismissals without cause grew out of the concern that unfettered employer discretion would result in a patronage system that would distort the political process and hinder the providing of government services.

Second, the government as sovereign stands in a different relation to public servants than does the private sector employer to its employees. For example, the constitutional protections afforded government employees against their employers are not extended to private sector employees. The desire for responsive government, however, has led the courts to temper the constitutional rights of public employees in order to facilitate management's ability to supervise and control its work force.

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330. *See* H. WELLINGTON & R. WINTER, *supra* note 111, at 21–24 (arguing that government services are generally "essential" to the public's safety, health, and welfare).

331. OHIO REV. CODE ANN. § 4117.16 (Page Supp. 1984); *see supra* text accompanying note 25.

332. *See* Weiler, *supra* note 80, at 412–14 (arguing that private sector law should not be altered to prohibit employers from operating during a lawful strike by their employees).

A third guiding force in the development of public employment law in Ohio should be the interaction among the civil service system, the PECBL, and constitutional law. The complexity of the interrelationships among these three sources of public employment law must be heeded in fashioning doctrine in the public employment sphere.

This Article maintains that public employers should not have the right to replace permanently any public employees engaged in a lawful economic strike. Such a position constitutes a major departure from private sector principles, where, as a practical matter, permanent replacement of economic strikers is the most effective weapon that a private employer has in its arsenal to combat economic strikes. Consequently, this Article examines all the considerations that are relevant to the question and discusses possible objections to the position taken.

Imposing the *Mackay* doctrine on the Ohio public sector collective bargaining scheme would both unnecessarily devalue the rights of public employees and undercut the public's interest in reducing labor strife. This Article argues that the public employer's right to replace lawful strikers can be defined in a way that would better accommodate the essential interests of government employers and employees, as well as those of the public. The temporary replacement approach, coupled with the temporary right to subcontract and to use supervisors and non-bargaining unit personnel, harmonizes the government employer's dual role as public manager and provider of public services, without rendering public employees' hard-won collective bargaining and strike rights an illusory gain.

Notwithstanding its outdated tone, the position that the SERB and the Ohio courts should take is wisely and poignantly capsulized by Andrew Carnegie, the founder of the Carnegie Steel Company:

> I would have the public give due consideration to the terrible temptation to which the workingman on a strike is sometimes subjected. To expect that one dependent on his daily wage for the necessaries of life will stand by peaceably, and see a new man employed in his stead is to expect much. The poor man may have a wife and children dependent on his labor. Whether medicine for a sick child, or even nourishing food for a delicate wife, is procurable, depends upon his steady employment. . . . No wise employer will lightly lose his old employees. Length of service counts for much in many ways. Calling upon strange men should be the last resort.[333]

333. *Quoted in* L. WOLFF, LOCKOUT: THE STORY OF THE HOMESTEAD STRIKE OF 1892: A STUDY OF VIOLENCE, UNIONISM, AND THE CARNEGIE STEEL EMPIRE 28 (1965).